Manitoba Law Reform Commission
432-405 Broadway, Winnipeg, Manitoba R3C 3L6
T 204 945-2896 F 204 948-2184
Email: lawreform@gov.mb.ca
http://www.gov.mb.ca/justice/mlrc

WAIVERS OF LIABILITY FOR SPORTING AND RECREATIONAL INJURIES

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John C. Irvine
Hon. Mr. Gerald O. Jewers
Alice R. Krueger
Hon. Mr. Justice Perry Schulman

Legal Counsel:

Darlene Jonsson
Leah Craven

Administrator:

Debra Floyd

The Commission offices are located at 432-405 Broadway, Winnipeg, MB R3C 3L6
Tel: (204) 945-2896
Fax: (204) 948-2184
Email: lawreform@gov.mb.ca
Website: http://gov.mb.ca/justice/mlrc

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TABLE OF CONTENTS

		Page #
CHAPTER 1 - INTRODUCTION		1
A.	OVERVIEW	1
B.	SCOPE OF REPORT	2
C.	ACKNOWLEDGEMENTS	3
CHAPTER 2 – PROVIDERS OF SPORTING AND RECREATIONAL ACTIVITIES - SOURCES OF LIABILITY AND THE VALIDITY AND SCOPE OF WAIVERS		4
A.	SOURCES OF LIABILITY	4
1.	*The Occupiers' Liability Act*	4
2.	The Tort of Negligence	5
3.	Contract	5
B.	DEFENCES OF LIABILITY	5
1.	Occupiers' Liability	5
2.	Negligence	7
3.	Contract Law	7
4.	The Validity and Scope of the Contractual Waiver	8
(a)	Validity of the Waiver	8
(i)	Contract Formation	8
(i)(a)	Unsigned Writing	8
(i)(b)	Signed Documents	9
(b)	Non Est Factum	12
(c)	Misrepresentation	12
(d)	Unconscionability	13
(e)	Public Policy	14
(f)	Minors	14
(g)	The Scope of the Waiver	15
(i)	Privity of Contract	15
(ii)	Interpretation	15
CHAPTER 3 – WAIVER CASES - AN ANALYSIS		18
A.	ALL CASES	18
B.	PRE-TRIAL MOTIONS/TRIALS AND APPEALS	18
C.	UNSIGNED DOCUMENTS/SIGNED DOCUMENTS	19
D.	ACTIVITIES	19
E.	DATE OF DECISION	19
F.	PROFIT/NON-PROFIT PROVIDERS	19
G.	JURISDICTION	19
H.	CONCLUSION	20

CHAPTER 4 - CONSUMER PROTECTION LEGISLATION IN MANITOBA 21
A. THE CONSUMER PROTECTION ACT 21
B. THE BUSINESS PRACTICES ACT 22
C. CONCLUSION 23

CHAPTER 5 – THE REPORT OF THE LAW REFORM COMMISSION OF BRITISH COLUMBIA ON RECREATIONAL INJURIES 24

CHAPTER 6 – STATUTORY CONTROL OF WAIVERS IN ENGLAND, WALES AND NORTHERN IRELAND 27

CHAPTER 7 - WAIVERS - ARGUMENTS FOR AND AGAINST ENFORCEABILITY 30
A. ARGUMENTS FAVOURING ENFORCEABILITY 30
B. ARGUMENTS AGAINST ENFORCEABILITY 31

CHAPTER 8 – OPTIONS FOR REFORM 35
A. JUDICIAL CONTROL 35
B. UNENFORCEABILITY OF WAIVERS 35
1. Business Providers of Sporting and Recreational Activities 36
(a) Unenforceability 36
(b) Partial Unenforceability 36
(c) Non-Profit Providers of Sporting and Recreational Activities 38
C. BROADER PERSPECTIVES 39

CHAPTER 9 – THE CONSULTATION PROCESS 40

CHAPTER 10 – RECOMMENDATIONS 43

CHAPTER 11 – LIST OF RECOMMENDATIONS 49

APPENDIX A – TABLE OF CASES 52

APPENDIX B – CONSULTATION RESPONDENTS 54

EXECUTIVE SUMMARY 56

SOMMAIRE 58

CHAPTER 1

INTRODUCTION

A. OVERVIEW

This report deals with the use of written contractual waivers[1] of liability by both business and non-profit providers of sporting and recreational activities.[2] Contractual waivers are usually required to participate in activities as diverse as skiing, horse-back riding, sky diving, martial arts instruction, rock climbing, auto racing, snowmobile racing, softball, baseball and hockey games, running events, community club activities and charitable events. Frequently the waiver is contained in a written and signed document but it may be found on tickets or signs located at the site of the activity.

The leading Manitoba case dealing with the validity of such waivers is *Dyck v. Manitoba Snowmobile Association Inc.*[3] It provides a useful introductory illustration of the use, nature and enforcement of waivers of liability. In that case the plaintiff, Dyck, aged 19, brought an action in negligence against the Manitoba Snowmobile Association (the Association) and one of its officials, Woods, for serious injuries suffered in a snowmobile race organized and run by the Association. Dyck was racing towards the finish line when Woods, the flag man for the race, negligently ventured too far onto the track to signal the end of the race. The plaintiff tried to avoid colliding with him but lost control of his snowmobile and crashed into the bank of the track.

The central issue was whether a clause in the entry form signed by Dyck protected the Association and Woods from liability for the harm caused by the latter's negligence. The clause read:

> I have read the supplementary regulations issued for this event and agree to be bound by them. In consideration of acceptance of this entry or my being permitted to take part in this event, I AGREE TO SAVE HARMLESS AND KEEP INDEMNIFIED the M.S.A and/or the M.S.A., its organizers, and their respective agents, officials, servants and representatives from and against all claims, actions, costs and expenses and demands in respect to death, injury, loss or damage to my person or property, howsoever caused, arising out of or in connection with my taking part in this event and notwithstanding that the same may have been contributed to or occasioned by the negligence of the said bodies, or any of them, their agents, officials, servants or representatives. It is understood and agreed that this Agreement is to be binding on myself, my heirs, executors and assigns.

---

1 This report uses the word 'waiver' to include all documents including releases, indemnities and covenants not to sue designed to allocate the responsibility for wrongdoing causing personal injury or death to another person.

2 This report uses the word 'recreational activities' to refer to physical leisure activities and uses the word 'provider' to refer to a person or organization providing a recreational activity. These definitions have been adapted from the Law Reform Commission of British Columbia Report on *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities* (Report #140, 1994).

3 [1985] 1 S.C.R. 589.

> IN WITNESS WHEREOF I/we have hereunder set my/our hand and seal this day of February 23, 1975.[4]

The trial judge found that since Dyck had read the clause before he signed it and knew that it related to the responsibility of the Association to him in the event of an accident it was a binding contractual waiver of liability which protected both the Association and its officials and employees, including Woods, from liability. An appeal to the Manitoba Court of Appeal was unsuccessful. Dyck appealed to the Supreme Court where a wide ranging attack was made on the validity of the waiver clause. The Court unanimously dismissed the appeal. In its opinion the clause was neither unfair, unreasonable nor inapplicable to the accident under consideration. Neither was it unconscionable nor against public policy to enforce such a clause. The Court concluded:

> ...the races carried with them inherent dangers of which the appellant should have been aware and it was in no way unreasonable for an organization like the Association to seek to protect itself against liability from suit for damages arising out of such dangers.[5]

B. SCOPE OF REPORT

This report considers whether it remains good policy in the twenty-first century to permit providers of sporting and recreational activities to allocate the burden of their negligence to the consumers of these activities. The report begins with an examination of the legal principles relating to the potential liability of providers and the validity and scope of contractual waivers. Secondly, a survey is made of judicial decisions in cases dealing with the validity of waivers over the past forty years. Thirdly, the impact of Manitoba's consumer protection legislation on the validity and scope of waivers is considered. Fourthly, consideration is given to the Law Reform Commission of British Columbia Report on *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities*.[6] Fifthly, we review the approach to waivers contained in the Unfair Contract Terms legislation of England, Wales and Northern Ireland.[7] Sixthly, the policy arguments both for and against the enforceability of waivers are reviewed. Seventhly, the options for reform are identified. Finally, the Commission undertook a consultation process and the submissions that were made to the Commission are reviewed. The report concludes with our recommendations.

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4 *Dyck v. Manitoba Snowmobile Association Inc.* (1981), 11 Man.R. (2d) 308 at para. 15.

5 *Supra* note 3 at para. 10.

6 *Supra* note 2.

7 *Unfair Contract Terms Act 1977* (U.K.), 1977, c. 50.

C. ACKNOWLEDGEMENTS

The Commission wishes to thank Professor Phillip H. Osborne of the Faculty of Law, University of Manitoba, who proposed this project and was retained as our consultant to prepare a draft report from which the Commission has made its recommendations. Professor Osborne has kept in touch with this project and his guidance is very much appreciated. The Commission also thanks Mr. James Lee, Lecturer, Birmingham Law School, who was consulted to provide legal research and advice respecting the use of waivers of liability in the United Kingdom. His assistance is gratefully acknowledged. Professor Arthur Braid of the Faculty of Law, University of Manitoba also provided assistance by preparing a memorandum on a related issue. Finally, the Commission wishes to thank those who responded during the consultation process. A list of the individuals and organizations that provided written submissions is found in Appendix B.

It should be noted that the recommendations contained in this report are those of the Commission and do not necessarily reflect the views of our consultants or those who provided submissions.

CHAPTER 2

PROVIDERS OF SPORTING AND RECREATIONAL ACTIVITIES - SOURCES OF LIABILITY AND THE VALIDITY AND SCOPE OF WAIVERS

Waivers are generally designed to negate the civil liability of the providers of sporting or recreational activities for the personal injury or death of a consumer caused by their negligence or other forms of misconduct. In this chapter we review both the potential bases of the civil liability of providers and the principles controlling the validity and scope of waivers of liability.

A. SOURCES OF LIABILITY

The liability of the providers of sporting and recreational activities for personal injury or death of consumers may arise under three regimes of legal responsibility: *The Occupiers' Liability Act*,[1] the tort of negligence or the law of contract. Each will be considered in turn.

1. *The Occupiers' Liability Act*

If the activity takes place on land controlled by the provider, *The Occupiers' Liability Act* applies. Section 3 reads:

> 3(1) An occupier of premises owes a duty to persons entering on the premises and to any person, whether on or off the premises, whose property is on the premises, to take such care as, in all the circumstances of the case, is reasonable to see that the person or property, as the case may be, will be reasonably safe while on the premises.
>
> 3(2) The duty referred to in subsection (1) applies in respect of
>
> (a) the condition of the premises;
> (b) activities on the premises; and
> (c) the conduct of third parties on the premises.

Two points deserve emphasis. The obligation of an occupier/provider to a consumer is essentially one of reasonable care and the obligation extends to the activities of the provider and the conduct of third parties.

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1 C.C.S.M. c. 08 [*The Occupiers' Liability Act*].

2. The Tort of Negligence

If the provider of the activity is not an occupier, the tort of negligence is the usual basis of liability. The provider is under a duty of care to the consumer. The standard of care is that of the reasonably careful provider in similar circumstances.

3. Contract

There may be contractual liability when the provider is not an occupier and the consumer has paid for the activity. In the absence of a provision to the contrary, the contract for services contains an implied warranty that the provider will take reasonable care for the safety of the consumer. This obligation is consistent with the duty of care in negligence. Consequently, there is normally no advantage in framing the claim in contract and it is usual for consumers to sue in negligence when the provider is not an occupier.

It may be noted that there is a commonality among the obligations among these different heads of liability. Broadly speaking, providers are under an obligation of reasonable care for the security and safety of consumers. This is a modest obligation and in the absence of an express contractual provision to the contrary there is no obligation to guarantee the safety of consumers.

B. DEFENCES OF LIABILITY

A provider may defend actions brought under each of the regimes of responsibility by proving that the consumer voluntarily assumed the risk of the provider's failure to take care. There are, however, minor differences as to how that issue is approached under the three heads of liability.

1. Occupiers' Liability

Occupiers may rely on the pertinent parts of sections 3(3) and 4 of *The Occupiers' Liability Act*. Section 3(3) reads:

> Notwithstanding subsection (1), an occupier of premises owes no duty of care to a person entering on the premises or whose property is on the premises in respect of any risks willingly assumed by that person.

This provision has been judicially interpreted in a manner which is consistent with the defence of voluntary assumption of risk in the tort of negligence (which will be discussed below).

The pertinent parts of section 4 read:

> 4(1) An occupier may, by express agreement or by express stipulation or notice,
>
> (b) restrict, modify or deny the duty referred to in subsection 3(1) subject to any prohibition or limitation imposed by this or any other Act of the Legislature against or on the restriction, modification or denial of the duty.
>
> 4(2) No restriction, modification or denial of the duty referred to in subsection 3(1), whether by agreement, stipulation or notice, is valid or binding against any person unless in all the circumstances of the case it is reasonable and, without limiting the circumstances to be considered in any case, in determining the reasonableness of any restriction, modification or denial of the duty, the circumstances to be considered shall include
>
> (a) the relationship between the occupier and the person affected by the restriction, modification or denial;
>
> (b) the injury or damage suffered and the hazard causing it;
>
> (c) the scope of the purported restriction, modification or denial; and
>
> (d) the steps taken to bring the restriction, modification or denial to the attention of the persons affected thereby.
>
> 4(3) Subject to subsections (4) and (5), where an occupier restricts, modifies or denies the duty referred to in subsection 3(1), the occupier shall take reasonable steps to bring the restriction, modification or denial to the attention of the person to whom the duty is owed.
>
> 4(4) An occupier of premises shall not restrict, modify or deny the duty referred to in subsection 3(1) which respect to a person who is empowered or permitted under the law to enter or use the premises without the consent or permission of the occupier.

The key elements of the power to negate the obligation of care in these provisions are reasonable notice and the reasonableness of the stipulation or notice (waiver). The requirement of reasonableness of such provisions is not found in tort or contract law.

2. Negligence

Providers whose liability is based in the tort of negligence must establish the defence of 'voluntary assumption of risk' or *volenti non fit injuria*. The defence is established by providing an implied or express agreement between the provider and the consumer under which the consumer voluntarily accepts the physical risk of being harmed by the provider's negligence and agrees to forego any legal right of action in respect to such harm.[2] It is notoriously difficult to establish an implied agreement from the circumstances. That is why providers rely so frequently on express contractual waivers of liability. We noted earlier that subsection 3(3) of *The Occupiers' Liability Act* has been interpreted consistently with the test of 'voluntary assumption of risk' in negligence.

3. Contract Law

Under contract law the implied warranty to take reasonable care may be negated by a suitably worded exemption clause (waiver) in the contract.

The legal advisers of providers cannot always be sure which of these three regimes of liability their clients may be subject to. In respect of some aspects of their operation they may be occupiers and in respect of others they may be under a duty of care in negligence. There is also the risk that cases may be mis-characterized by litigators and judges. Occupiers' liability cases may be analyzed as negligence actions.[3] The most effective legal device to protect providers is, therefore, a comprehensive written contractual waiver which purports to negate all potential liabilities, however they might be framed. This provides strong evidence of the consumer's agreement to assume the risk of the provider's wrongdoing under *The Occupiers' Liability Act*, the tort of negligence or in contract.

The drafting of an effective comprehensive waiver does, however, demand a good knowledge of the law and a careful and precise use of language. Judges tend not to favour waivers of liability since they seek to negate the fair and reasonable obligation of providers to take reasonable care for the safety of consumers. The law places great value on personal safety and the physical integrity of the individual. Consequently, drafters can expect the courts to scrutinize carefully contractual waivers to determine their validity and scope.

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2 *Dube v. Labar*, [1986] 1 S.C.R. 649.

3 See *Dyck v. Manitoba Snowmobile Association Inc.*, [1985] 1 S.C.R. 589, which was framed as a negligence action albeit that it appears to fall within the scope of *The Occupiers' Liability Act* [*Dyck v. Manitoba Snowmobile Association*].

4. The Validity and Scope of the Contractual Waiver

A review of the cases on contractual waivers of liability indicates that waivers are attacked on the grounds of the invalidity of the contract of waiver or, if the contract is valid, on the scope and application of a waiver to the case at hand. These two aspects of judicial control of waivers are considered here.

(a) Validity of the Waiver

A contractual waiver may be invalid on a number of grounds. There may be a failure to satisfy the requirements of formation of contract (offer and acceptance and consideration). The contract may be nullified by a fundamental mistake (*non est factum*), misrepresentation or unconscionability. It may be found to be against public policy or it may be unenforceable against a minor consumer. Each of these issues will be examined in turn.

(i) Contract Formation

The primary elements of a valid contract are an offer to contract (normally by the provider who is willing to supply the service subject to the waiver) and an acceptance of that offer (the signature or other act of assent by the consumer) and consideration (payment or a promise of payment in return for the services provided). Many cases focus on the initial requirement of an agreement resulting from an offer and acceptance. Although this element of contractual formation is uniform to all contracts it is conventional for the purposes of analysis to divide contractual waiver cases into two classes: waivers contained in unsigned tickets, billboards and notices and those which are found in signed documents.

(i)(a) Unsigned Writing

The general rule is that the waiver is not enforceable unless reasonable notice of the waiver has been provided by the party relying on it at or before the time of contract formation. The theory is that unless such notice is given the waiver does not become part of the offer and, consequently, is not a term of the contract. There are, therefore, two issues, namely has reasonable notice been given and, if so, when was it given?

The test of reasonable notice is objective. The question is not whether the plaintiff knew of the waiver or if he knew of it did he understand it? The question is whether a reasonable person would know that the waiver was intended as a term of the contract? The answer depends upon a close analysis of the facts including the location of the notice (on a ticket, the reverse side of a ticket, a billboard or sign or in the heart of a lengthy unsigned document), the distinctiveness of the waiver (the size of the notice/ticket, the size of the font, the position of a billboard or sign and the use of contrasting colours or bold print), the speed of the transaction and the

opportunity to be aware of and read the waiver, the clarity of the language, any statements made by the provider, familiarity with the provider's enterprise and its use of waivers and any other pertinent circumstances.[4]

The adequacy of the notice is an issue on which judicial opinion may differ. Many cases are close to the borderline. This is because the lawyers drafting waivers may be attempting to resolve two competing tensions. On the one hand they wish to comply with the notice requirements to secure the validity of the waiver. On the other hand they may have no desire to make it too obvious to the consumer that the provider is seeking immunity from its normal obligation to take reasonable care. It is not good business to explain in detail to a prospective sky-diver that no responsibility is undertaken for packing his parachute with due care. Consequently, the drafter walks a fine line hoping to satisfy legal pre-requisites of validity without communicating too fully the nature of the document to the consumer.

Drafters of waivers in unsigned documents must also pay close attention to the form of the transaction and ensure that the notice is given before or at the time the contract is made. If a waiver is found on a sign at the top of the ski-hill it will be seen as an attempt to unilaterally impose a term into a contract that was made when the consumer entered the premises and paid for a ski ticket at the foot of the hill. The notice is too late. The same conclusion is reached on the basis of a failure of consideration because the consideration (fee) is provided before the waiver comes to the attention of the consumer. The consideration is therefore past, and falls afoul of the rule that past consideration is no consideration.

(i)(b) Signed Documents

The traditional rule was that a signature on a written contract bound the parties to the terms of the contract whether or not the parties were aware of the term, understood the term or had reasonable notice of the term unless the signer could prove *non est factum* or a misrepresentation.[5] This rule created a significant incentive to providers to use signed contractual waivers. There was no need to give reasonable notice and a waiver hidden in a lengthy document was *prima facie* enforceable. The potential for such a rule to create injustice is clearly evident. A consumer might waive her right of action without any awareness of doing so.

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4 *Champion v. Ski Marmot Basin*, 2005 ABQB 535, 379 A.R. 173; *Pelechytik v. Snow Valley Ski Club*, 2005 ABQB 532, 53 Alta. L.R. (4th) 117; *Nairne v. Wagon Wheel Ranch Ltd.* (1995), 54 A.C.W.S. (3d) 1386 (Ont. Ct. J. (Gen. Div.)); *Greeven v. Blackcomb Skiing Enterprises Ltd.* (1994), 22 C.C.L.T. (2d) 265 (B.C.S.C.); *McQuary v. Big White Ski Resort Ltd.* (1993), 42 A.C.W.S. (3d) 940 (B.C.S.C.).

5 *L'Estrange v. Graucob*, [1934] 2 K.B. 394 (C.A.) *Non est factum* and misrepresentation are discussed below.

The decision of the Ontario Court of Appeal in *Tilden Rent-a Car Company v. Clendenning* [6] sought to minimize the dichotomy between unsigned and signed documents by holding that in certain circumstances onerous and unexpected clauses in a signed contract are not enforceable unless reasonable notice of the clause was given to the consumer. The rule in *Tilden* was explained and applied in respect of a contractual waiver of liability in *Karroll v Silver Star Mountain Resorts Ltd.* [7] where McLachlin J. (as she then was) held that the plaintiff skier would not be bound by a signed waiver if she could establish that;

> (1) in the circumstances a reasonable person [in the position of the provider] would have known that she [the consumer] did not intend to agree to the release [waiver] she signed, and:
>
> (2) in these circumstances the defendants [providers] failed to take reasonable steps to bring the content of the release [waiver] to her [the consumer's] attention.

The first step demands proof that the signer was mistaken about the nature or consequences of the waiver and the provider was aware of the mistake. In such circumstances the waiver will nevertheless be valid if reasonable notice of the waiver is given under step two. Some judges de-emphasize the first step and focus more on the reasonable notice point. This is particularly so in a case where the judge is of the opinion that the provider has given reasonable notice, thereby rendering the answer to the first step moot. Consequently, there is now a great deal of focus in the cases on the requirement of reasonable notice. All the factors referred to in respect of the notice requirement in the unsigned documents are relevant. In addition, consideration is given to the protocol of obtaining the signature of the consumer including the location of the signature on the document, the initialing of various clauses, the length and complexity of the document and whether the document is exclusively a waiver or is a document with a multiplicity of purposes thereby confusing the consumer. Additional factors such as the education, experience and sophistication of the consumer and the number of times the consumer had on prior occasions participated in the activities may also be considered.[8]

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6 (1978), 18 O.R. (2d) 601 (C.A.) [*Tilden*].

7 (1988), 33 B.C.L.R. (2d) 160 (B.C.S.C.) [*Karroll*].

8 *Kettunen v. Sicamous Fireman's Club* (1999), 90 A.C.W.S. (3d) 576 (B.C.S.C.); *Schuster v. Blackcomb Skiing Enterprises Ltd. Partnership* (1994), [1995] 3 W.W.R. 443 (B.C.S.C.); *Clarke v. Action Driving School Ltd.* (1996), 62 A.C.W.S. (3d) 1240 (B.C.S.C.).

The drafters of waivers have, to a significant degree, adjusted to the rule in *Karroll* and in many of the cases on signed written waivers reasonable notice of the waiver has been established.[9] In some cases courts have drawn a conclusion that is generous to the consumer.[10] The Supreme Court decision in *Crocker v. Sundance Northwest Resorts Ltd.*[11] is illustrative of such an approach. Crocker had signed a written waiver of liability before participating in a race down a moguled ski hill on inner tubes. The race was organized and run by the defendant. Crocker, who was visibly intoxicated, was seriously injured when he fell off his tube on the way down the slope. The liability of the defendant was based on its failure to protect Crocker and prevent him from participating in the competition. Wilson J. speaking for the Court refused to enforce the waiver on the grounds that Crocker had not read it, did not know what it was and thought that the document he signed was no more than an entry form. Nevertheless, the circumstances were such that some courts would have found that Crocker did have reasonable notice of the clause and chose to ignore it. It may be argued, for example, that Crocker was dealt with much more leniently than Dyck in *Dyck v. Manitoba Snowmobile Association*, albeit that the Court was able to find factual distinctions which in its view justified the different outcomes.

There have also been attempts to argue that signed waivers are unsupported by consideration.[12] The argument is based on the contention that the contract to participate in the activity was made and the fee was paid before the waiver was signed. The waiver contract, therefore, fails because the only possible consideration (the fee) is past consideration. In his dissenting judgment in *Delaney v. Cascade River Holidays Ltd.*[13] Nemetz C.J. found that the contract to go white-water rafting was made before the waiver was signed. Since the making of the contract and the release were not contemporaneous the waiver was invalid. This argument has, however, met with little success. Lawyers are more aware of this issue and will

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9 *Goodspeed v. Tyax Mountain Lake Resort Ltd.*, 2005 BCSC 1577, 143 A.C.W.S. (3d) 779; *Dixon v. British Columbia Snowmobile Federation*, 2003 BCCA 174, 120 A.C.W.S. (3d) 1066; *Mayer v. Big White Ski Resort Ltd.* (1998), 82 A.C.W.S. (3d) 820 (B.C.C.A.); *Ochoa v. Canadian Mountain Holidays Inc.*, [1996] B.C.J. No. 2026 (B.C.S.C.) (QL); *Schuster v. Blackcomb Skiing Enterprises Ltd.*, *supra* note 8; *Ocsko v. Cypress Bowl Recreations Ltd.* (1992), 74 B.C.L.R. (2d) 159 (B.C.C.A.); *Blomberg v. Blackcomb Skiing Enterprises Ltd.* (1992), 64 B.C.L.R. (2d) 51 (B.C.S.C.); *Milina v Bartsch* (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.).

10 *Parker v. Ingalls (c.o.b Pure Self Defence Studios)*, 2006 BCSC 942, 150 A.C.W.S. (3d) 508; *Kettunen v. Sicamous Fireman's Club*, *supra* note 8. See also *Llewellyn v. MacSwain* (1993), 106 Nfld. & P.E.I.R. 101 (P.E.I. S.C. (T.D.)).

11 [1988] 1 S.C.R. 1186.

12 *Mayer v. Big White Ski Resorts Ltd.*, *supra* note 9; *Clarke v. Action Driving School Ltd.*, *supra* note 8; *Milina v. Bartsch*, *supra* note 9; *Delaney Estate v Cascade River Holdings Ltd.* (1983), 44 B.C.L.R. 24 (B.C.C.A.).

13 *Ibid.*

normally advise clients to get the waiver signed in an early and timely fashion. Moreover, some judges prefer to characterize the various stages of the transaction between the provider and the consumer as "one continuous transaction"[14] thereby negating the significance of the timing of the waiver.

(b) Non Est Factum

This plea, which was recognized in *L'Estrange v. Graucob*,[15] is very difficult to establish. The principle is that if a party to a contract makes a fundamental mistake about the nature or contents of a contract and that mistake is not a consequence of the negligence of the party relying on the plea the contract is void. In waiver cases it is not unusual for a mistake to have been made by the consumer but it is usually the consequence of the signer's lack of diligence in reading the document or inquiring as to its nature and effect.[16] Consequently, waivers normally survive an argument based on *non est factum*.

(c) Misrepresentation

A misrepresentation is an erroneous and material statement of fact which induces a person to enter a contract. As a general rule a misrepresentation renders the contract voidable at the option of the misrepresentee. Additionally, a misrepresentation of the nature, purpose or scope of the waiver clause may either negate the waiver clause leaving the rest of the contract valid, or result in the waiver being interpreted in a manner which is consistent with the misrepresentation.[17]

A misrepresentation may relate directly to the scope of the waiver. *Poluk v. Edmonton (City)*[18] is illustrative. In that case, the waiver was described as one which only applied when the signer was hit by a golf ball. The terms of the waiver were much broader and it would have covered the injury caused to a consumer by tripping over a concealed iron post on the premises of the golf club if it had not been negated by the misrepresentation. Unsuccessful attempts have been made to argue that a waiver is abrogated because of a failure to disclose pertinent facts.

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14 *Wurban v. Lipak* (1982), 40 A.R. 1 (Alta. Q.B.).

15 *Supra* note 5.

16 *Mayer v. Big White Ski Resort Ltd.*, *supra* note 9.

17 *Curtis v. Chemical Cleaning and Dyeing Co.*, [1951] 1 K.B. 805.

18 (1996), 191 A.R. 301 (Alta. Q.B.).

In *Knott v. Doe*[19] it was held that the failure of the defendant horse riding instructors to disclose that they were not certified instructors was not a misrepresentation sufficient to negate the waiver. It has also been suggested that the language of the waiver itself may be construed as a misrepresentation. The dissenting judgment of Nemetz C.J.B.C. in *Delaney Estate v Cascade River Holdings Ltd.*[20] is illustrative. He found that the description of the waiver as standard disguised its onerous nature, that the use of the words 'loss or damage' rather than personal injury and death obscured its meaning and that the use of the phrase 'assumption of all risks' without specifying the assumption of the risk of inadequate life-jackets down-played the true nature of the comprehensive waiver.

Nevertheless arguments based on misrepresentation have rarely been successful.[21] There are a number of reasons for this. First, providers are unlikely to initiate discussions about the waiver and are likely to discourage their employees from doing so. In one case an employee of a ski operator testified that if she were asked about the meaning of the waiver her reply would be "read it yourself".[22] The intent of providers may be to secure a signature rather than a fully informed consent. Secondly, the plaintiff carries the burden of proof of a verbal misrepresentation. That may be very difficult to discharge. The defendant may deny such a representation was made. There may be no independent witnesses present at the signing and the memory of those who were present may be corroded by the passage of time. Finally, drafters often anticipate the making of a misrepresentation and include in the waiver an enforceable "no misreps" clause which states either that no material representation was made to the signer or that the signer has not relied on any misrepresentation that may have been made. In the absence of fraud such clauses are normally enforceable.

(d) Unconscionability

An unconscionable contract is voidable at the option of the oppressed party. Unconscionability is established where a grossly unfair bargain has been secured by taking advantage of the vulnerability of a weaker contracting party where such vulnerability arises from circumstances such as illness, educational disadvantage, age or mental disability. It has been argued that waivers are unconscionable agreements given that valuable tort rights are forgone for very little in return. The argument generally founders, however, on the inability to prove any exploitation of a special vulnerability of the consumer.[23] The Supreme Court summarily dismissed the argument that waivers in typical situations are unconscionable in *Dyck v. Manitoba Snowmobile*

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19 2005 BCSC 240, 137 A.C.W.S. (3d) 302. See also *Stein v. Exec-U-Fit Personal Fitness Training Centres* Inc. (2007), 157 A.C.W.S. (3d) 520 (Ont. S.C.J.) (failure to disclose a lack of expertise in rock climbing).

20 *Supra* note 12.

21 *Goodspeed v. Tyax Mountain Lake Resort Ltd.*, *supra* note 9; *Knott v. Doe*, *supra* note 19; *Delaney Estate v. Cascade River Holidays Ltd.*, *supra* note 12; *Poluk v. Edmonton (City)*, *supra* note 18.

22 *Blomberg v.Blackcomb Skiing Enterprises Ltd.*, *supra* note 9.

23 *Ochoa v. Canadian Mountain Holidays Inc.*, *supra* note 9. See also *Knowles v. Whistler Ski Corp.*, [1991] B.C.J. No. 61 (B.C.S.C.) (QL).

Association[24] albeit that Dyck was a young person who gave up valuable tort rights in return for participation in a race which promised $200 to the winner. The argument has been no more successful in other cases.[25]

(e) Public Policy

Contracts which are against public policy are void and unenforceable. This is an argument that has been pressed in only a few cases, possibly because of the summary manner in which the point was dismissed by the Supreme Court in *Dyck v. Manitoba Snowmobile Association*. Other courts have also stated expressly that waivers are not contrary to public policy.[26] Other courts appear to regard the question as being still open.[27]

(f) Minors

Waivers are commonly obtained from minors and their parents. They may have some practical force in persuading minors that they cannot sue, but their legal validity is doubtful. The general rule is that a contract with a minor for necessary goods and services is enforceable by and against the minor. Contracts for services which are not necessaries are enforceable by the minor but not against the minor. Waiver agreements and the underlying contract for sporting or recreational services are unlikely to be construed as necessary.[28] Providers may, however, attempt to foreclose indirectly the action of a child by means of an indemnity agreement signed by the parent. An indemnity agreement states that the parent will indemnify the provider for any legal costs or payments made pursuant to a settlement or trial judgment in favour of the child. It seeks to shift the loss from the provider to the parent thereby deterring a parent from instigating an action on behalf of the child. There is authority declaring such agreements to be against public policy[29] and, therefore, void but the use of such agreements continues and the matter has not been tested recently.

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24 *Supra* note 3.

25 *Clarke v. Action Driving School Ltd.*, *supra* note 8; *Blomberg v. Blackcomb Skiing Enterprises Ltd.*, *supra* note 9; *Knowles v. Whistler Mountain Ski Corp.*, *supra* note 23. But see, *Cudmore Estate v. Deep Three Enterprises Ltd.*, [1991] O.J. No. 1453 (Ont. Ct. (Gen. Div.)) (QL).

26 *Ochoa v. Canadian Mountain Holidays Inc.*, *supra* note 9.

27 *Pelechytik v. Snow Valley Ski Club*, *supra* note 4.

28 *Miller (Next friend of) v. Sinclair (c.o.b. Sinclair's Riding Stables)* (1980), 5 A.C.W.S. (2d) 442 (Ont. H.C.J.).

29 *Stevens v. Howitt*, [1969] 1 O.R. 761 (Ont. H.C.J.).

(g) The Scope of the Waiver

The legal principles relating to the validity of the contract are complemented by principles that control the scope and application of contractual waivers. They relate primarily to the persons who are protected by the waiver (the privity question) and to the interpretation of the language of the waiver and the breadth of its application (the *contra proferentem* question). The various principles are outlined below.

(i) Privity of Contract

The general rule is that a contract imposes burdens on and provides benefits to the parties to it. A waiver, therefore, applies to the provider and the consumer and not to the employees' agents and independent contractors of the provider or other third parties involved either in delivering the service or participating in the activity. This provides a degree of control on the scope of a waiver. There is, however, a significant exception to the privity doctrine which protects some third parties. It applies where the wording of the waiver indicates that the provider and the consumer expressly or impliedly intend to cover such a person and the wrongdoing of that person arises from performance of the activities contemplated by the contract.[30] *Dyck* is illustrative. The contract of waiver was between the provider, the Manitoba Snowmobile Association, and the consumer, Dyck. Woods, the negligent flag man, was a third party. Nevertheless the language of the waiver made it clear that it was intended to cover the employees and officials of the Association and, furthermore the negligence of Woods took place in the course of the activity of snowmobile racing.[31] Woods was protected by the waiver.

This exception to the privity rules was made primarily to maintain the integrity of commercial contracts (initially Bills of Lading) which sought to allocate the risk of property damage for the purposes of insurance. Its application to personal injury cases has significantly broadened the scope of waivers and has diminished the rights of consumers.

(ii) Interpretation

Waivers are subject to the *contra proferentem* rule. It states that an exemption or exclusion clause such as a waiver of liability must be strictly construed against the party protected by the clause. Linguistic ambiguities, inconsistencies and uncertainties which are insufficient in themselves to negate the contract must be resolved in favour of the plaintiff/consumer.

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30 *Fraser River Pile & Dredge Ltd. v. Can-Drive Services Ltd.*, [1999] 3 S.C.R. 108.

31 See also, *Karroll v. Silver Star Mountain Resorts Ltd.*, *supra* note 7; *Wurban v.Lipak*, *supra* note 14 and *Lafontaine (Guardian ad litem of) v. Prince George Racing Association* (1994), 45 A.C.W.S. (3d) 419 (B.C.S.C.).

The rule focuses primarily on the meaning of the language used in the waiver and the scope of protection provided by it. There must, for example, be clear wording that liability for negligence is covered[32] and a waiver which negates liability in negligence may not negate liability for harm caused by gross negligence,[33] reckless conduct or criminal negligence. Many cases give rise to interpretive arguments of this kind.[34]

A waiver may also be attacked on the grounds that it does not cover the kind of negligent conduct at issue. It may be argued that it relates only to certain categories of negligent acts[35] or only to misconduct that was contemplated by the consumer[36] or to particular kinds of risks.[37] It has been argued, for example, that a waiver on a ski ticket applied only when the plaintiff was injured skiing not when he was injured by a mechanical defect in the ski lift,[38] that a waiver did not apply to an injury to a skier caused by an unexpected patch of slushy snow,[39] that a waiver applicable to snowmobile racing did not extend to practice sessions,[40] and that a waiver only covered negligence at a particular location.[41] In *McGivney v. Rustico Summer Haven (1977) Ltd.*[42] a waiver that referred to injuries arising from using a water-slide was not sufficient to exclude liability for an injury arising from the condition of the slide and in *Parker v. Ingalls (c.o.b. Pure Self Defence Studios)*[43] a waiver relating to martial arts instruction was held not to cover the risk of injury from the negligence of the instructor who the plaintiff trusted to protect him.

A waiver may also fail to protect a provider or third party because the person has not been named or identified with sufficient specificity. Some courts have taken quite a strict

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32 *Miller (Next friend of) v. Sinclair (c.o.b. Sinclair's Riding Stables), supra* note 28.

33 *Braid Estate v. Whistler River Adventures Ltd.*, 2000 BCSC 1740, 101 A.C.W.S. (3d) 650.

34 *Pascoe v. Ball Hockey Ontario Inc.* (2005), 137 A.C.W.S. (3d) 74 (Ont. S.C.J.); *Rauhanen v. Lee*, 2003 ABQB 84, 120 A.C.W.S. (3d) 539; *Clarke v. Action Driving School Ltd., supra* note 8; *Nairne v. Wagon Wheel Ranch Ltd., supra* note 4; *Smith v. Horizon Aero Sports Ltd.* (1981), 12 A.C.W.S. (2d) 192 (B.C.S.C.); *Simpson v. Nahanni River Adventures Ltd.*, [1997] Y.J. No.74. (Y. Terr. S.C.) (QL).

35 *Brown v. Blue Mountain Resort Ltd.* (2002), 116 A.C.W.S. (3d) 850 (Ont. S.C.J).

36 *Champion v. Ski Marmont Basin, supra* note 4; *Goodspeed v. Tyax Mountain Lake Resort Ltd., supra* note 9.

37 *Pascoe v. Ball Hockey Ontario Inc., supra* note 34.

38 *Pelechytik v. Snow Valley Ski Club, supra* note 4.

39 *Brown v. Blue Mountain Resort Ltd., supra* note 35.

40 *Dixon v. British Columbia Snowmobile Federation, supra* note 9.

41 *Kettunen v. Sicamous Fireman's Club, supra* note 8.

42 (1986), 64 Nfld. & P.E.I.R. 358 (P.E.I. S.C. (A.D.)).

43 *Supra* note 10.

approach.[44] In *Lyster v. Fortress Mountain Resorts Ltd.*,[45] for example, a poorly drafted waiver failed to protect the defendant from liability for its employee's negligence.[46] Other courts are more permissive and have been willing to interpret waivers more broadly as impliedly covering the person in question.[47]

A further interpretive device which has been raised in some of the waiver cases is the presumption that an exclusion clause such as a waiver does not cover a fundamental breach of the contract. This is a rule of construction of the document and operates on the premise that contracting parties are unlikely to have intended to protect a provider from a total failure of contractual performance. It has, however, proved to be very difficult to defeat a waiver on this basis[48] because acts of negligence are likely to be categorized as collateral to the performance of the contractual service and not fundamental to it.

Finally, there are some situations where a non-profit organization or association has written rules for its members covering a variety of matters including safety and precautionary measures. It has been argued that these safety provisions are independent contractual warranties and the waiver clause signed by a member/consumer must be interpreted subject to them.[49] The argument rarely gains traction because proof of contractual intent to give priority to the rules over the waiver is difficult to establish.

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44 *Quick v. Jericho Tennis Club* (1998), 40 B.L.R. (2d) 315 (B.C.S.C).

45 (1978), 6 Alta. L.R. (2d) 338 (Alta. S.C.).

46 See also *Cudmore Estate v. Deep Three Enterprises Ltd.*, *supra* note 25.

47 *Lafontaine (Guardian ad litem of) v. Prince George Auto Racing Assn.*, supra note 31; *Dixon v. Kamloops Exhibition Assn.*, 2002 BCSC 467, 113 A.C.W.S. (3d) 363; *Goodspeed v. Tyax Mountain Lake Resort Ltd.*, *supra* note 9; *Stein v. Exec-U-Fit Personal Fitness Training Centres Inc.*, *supra* note 19.

48 *Sibley v. British Columbia Custom Car Assn. (c.o.b. Mission Raceway Park and/orMission Raceways)*, 2005 BCSC 509, 138 A.C.W.S. (3d) 398. However, see *Cudmore Estate v. Deep Three Enterprises Ltd.*, *supra* note 25.

49 *Sibley v. British Columbia Custom Car Assn. (c.o.b. Mission Raceway Park and/orMission Raceways)*, *ibid.*

CHAPTER 3

WAIVER CASES - AN ANALYSIS

We reviewed 44 cases spanning four decades on personal injury or fatality claims made against providers of sporting and recreational activities that have been defended in full or in part by the use of a contractual waiver of liability.[1] Some of these cases dealt with pre-trial motions to dismiss the consumer's claim on the grounds that it was unsustainable given the waiver. Some involved trials on the merits and a few were appellate decisions. A list of the cases considered can be found in Appendix A. An analysis of these cases solely on the basis of the success or failure of plaintiffs may allow some tentative conclusions to be drawn about the efficacy of waivers in protecting providers from liability and the degree of unevenness of judicial decision making in this area of the law.

A. ALL CASES

Of those 44 cases, 22 cases were disposed of in favour of the plaintiff and 22 cases were disposed of in favour of the defendant. This indicates that despite the strenuous efforts of providers and their legal advisers, waivers of liability do not guarantee protection. These numbers may also indicate some degree of judicial hostility to attempts to avoid responsibility for the safety of consumers.

B. PRE-TRIAL MOTIONS/TRIALS AND APPEALS

Of those 44 cases, 20 were pre-trial motions seeking to dismiss the plaintiff's claim. Of those 20 cases, 11 were disposed of in favour of the plaintiff and 9 were disposed of in favour of the defendant. Of those 20 cases, only one was an appellate decision and it is included in the 11 cases where the plaintiff/appellant won.

24 cases proceeded to trials and 13 cases were ultimately resolved in favour of the plaintiff and 10 were decided in favour of the defendant. Of those 24 cases, 6 were at the appellate level, 5 of which were resolved in favour of the defendant.

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[1] This chapter builds upon course work done by Mr. Perry Cheung, a law student at the University of Manitoba in 2007, who conducted an analysis of these cases for a paper entitled "Signing Your Life Away: Waivers and Recreational Activities" (2007) [unpublished].

C. UNSIGNED DOCUMENTS/SIGNED DOCUMENTS

Of those 44 cases, 10 involved waivers in unsigned tickets or signs and 34 cases involved waivers were in the form of signed documents. Signed documents appear more likely to be protective of providers. Of the 10 cases dealing with the unsigned wording, 8 were decided in favour of the plaintiff and 2 were decided in favor of the defendant. Of the 34 cases dealing with signed written documents, 20 were decided in favour of the defendant.

In the most recent 20 cases, only 4 dealt with unsigned documents such as tickets. This probably evidences a modern trend to use signed documents.

D. ACTIVITIES

There appears to be no great disparity of result among various activities. 16 of the cases dealt with skiing accidents. Of those, 8 were decided in favour of the plaintiff and 8 were decided in favour of the defendant. In the other 28 cases dealing with a great diversity of activities, 14 were decided in favour of the plaintiff and 14 were decided in favour of the defendant.

E. DATE OF DECISION

The 44 cases were also grouped into the most and least recent decisions, the divide being 1995. Of the 23 earlier decisions, 10 were decided in favour of the plaintiff and 13 were decided in favour of the defendant. Of the more recent cases, 12 were decided in favour of the plaintiff and 9 for the defendant. This may indicate a growing judicial discomfort with waivers.

F. PROFIT/NON-PROFIT PROVIDERS

It is difficult with any degree of reliability to distinguish the business providers from the non-profit providers. In this analysis, it appears that there are only five cases dealing with non- profit providers. Three of these cases were decided in favour of the defendant.

G. JURISDICTION

Fully 24 of the cases were decided in British Columbia. Of those 24 cases, 10 were decided in favour of the plaintiff and 14 were decided in favour of the defendant. Of the 15 cases in the other jurisdictions, 10 were decided in favour of the plaintiff and 5 were decided in favour of the defendant. This may indicate a marginally more receptive attitude to waivers in British Columbia or that the providers, many of whom are ski hill operators, pay more attention to the requirements of validity.

H. CONCLUSION

This analysis is general and impressionistic. It may, nevertheless allow some tentative conclusions to be drawn.

First, waivers do not guarantee the protection that providers seek and prudent providers likely continue to carry liability insurance.

Secondly, the substantial number of cases and the largely even split in decision making is suggestive of substantial difficulty and contention in the settlement process where most cases are resolved. We suspect that a great amount of legal time and energy is expended in this process.

Thirdly, providers and consumers are faced with a very uncertain regime of responsibility and the outcome depends on the technicalities of waiver validity and interpretation and judicial discretion.

CHAPTER 4

CONSUMER PROTECTION LEGISLATION IN MANITOBA

The legislature of Manitoba has not been unmindful of the need for consumer protection in the marketplace and it has responded with legislation to protect consumers from the consequences of unequal bargaining power and unfair business transactions. In particular, *The Consumer Protection Act* [1] and *The Business Practices Act* [2] play important roles. Much of the legislation relates to sales of goods but it also contains provisions relating to the provision of commercial services including the providers of recreational and sporting activities. Each Act will be considered in turn.

A. THE CONSUMER PROTECTION ACT

The Consumer Protection Act deals with services in s. 58(6). It reads:

> Unless otherwise expressly agreed in writing signed by the buyer, there shall be implied in every retail sale of services a condition, on the part of the seller, that the services sold shall be provided in a satisfactory manner.

This provision would appear at first glance to provide no greater protection to consumers than the implied common law obligation to provide services with reasonable care and skill. The legislative standard of satisfactory may, however, be interpreted as depending on the result of the provision of services (satisfactory or not satisfactory) rather than the manner in which the services are provided (with reasonable care or not). A result may be unsatisfactory even when reasonable care and skill is taken. The section does, however, allow the provider to exempt itself from the statutory obligation by a signed written waiver. This power to exempt is in marked contrast to s. 58(1) of the Act which outlines the implied obligations of quality of goods imposed on retail sellers. These obligations may not be excluded by agreement between the parties. This dichotomy between services and goods is difficult to justify on policy grounds.

Reference should also be made to s. 58(8) of *The Consumer Protection Act*. It reads:

> Every oral or written statement made by a seller, or by a person on behalf of a seller regarding the quality, condition, quantity, performance or efficacy of goods or services that is
>
> (a) contained in an advertisement; or
>
> (b) made to a buyer,
>
> shall be deemed to be an express warranty respecting those goods or services.

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1 C.C.S.M. c. C200 [*The Consumer Protection Act*].

2 C.C.S.M. c. B120 [*The Business Practices Act*].

This section may provide a remedy for some consumers of sporting and recreational services where a misrepresentation is made. It does appear, however, that such a statutory warranty may be negated by an exemption clause such as a waiver.

B. THE BUSINESS PRACTICES ACT

The Business Practices Act provides extensive civil remedies for unfair business practices (as defined by the Act) in consumer transactions. A consumer transaction is defined in section 1 of the Act as:

> a transaction between a consumer and a supplier for the retail sale or lease or other retail commercial disposition, by the supplier to the consumer, of any goods, in the ordinary course of business of the supplier and primarily for the *consumer's personal, family or household use.* (emphasis added)

The scope of the consumer transaction is further clarified by section 1 of the Act which defines 'goods' as including services and 'supplier' as a person 'engaged in business'. The Act, therefore, applies to businesses providing sporting and recreational services of the kind under consideration in this report.

There are two unfair practices prohibited by the Act: misrepresentations made by the supplier,[3] and taking advantage of a consumer if the supplier knows or can reasonably be expected to know that the consumer is not in a position to protect the consumer's own interests.[4]

In respect of the former it has been noted earlier that at common law an operative misrepresentation may negate or limit the scope of a waiver of liability. The Act improves the common law protection in four ways. First, the definition of an operative misrepresentation is much broader than the common law and includes almost all misleading statements not merely those which are factual. Secondly, the definition of a misrepresentation includes in s. 2(1) the failure "... to do or say anything if, as a result a consumer might reasonably be deceived or misled". This may protect an uninformed consumer signing a waiver under a mistake. Thirdly, the responsibility for the misrepresentation may not be excluded by agreement between the parties. Fourthly, the Act provides a wider range of remedies than the common law.

The scope of the second category of unfair business practice is very uncertain and there is no authoritative judicial decision on point. The definition may be read very broadly to include a consumer of sporting or recreational services who signs a waiver the meaning of which is concealed to her understanding by the form or language of the document in which it is contained. It is, however, more likely to be read narrowly to include only those who because of their youth, impaired mental capacity, illness or lack of education are particularly vulnerable. On this interpretation the legislation largely reflects the common law doctrine of unconscionability.

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3 *The Business Practices Act*, *supra* note 2, see section 2.

4 *Ibid.*, see section 3.

C. CONCLUSION

The consumer protection legislation is not a panacea for the potential unfairness of waivers of liability. It does strengthen the common law protections of consumers and provides some additional weapons for consumers in their battle against waivers. It also evidences a legislative intent to protect consumers and promote fairness and justice in the retail marketplace.

CHAPTER 5

THE REPORT OF THE LAW REFORM COMMISSION OF BRITISH COLUMBIA ON RECREATIONAL INJURIES

The Law Reform Commission of British Columbia (the B.C. Commission) is the only Canadian law reform agency to have issued a report respecting the role of waivers in sporting or recreational activities. In 1994 it issued its report on *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities.*[1] It was prompted in large part by concerns of the British Columbia alpine skiing operators about the burden of liability placed on the industry by the provincial occupiers' liability legislation and anticipated increases in insurance costs. The industry sought both changes to that legislation and the enactment of special legislation similar to that in 26 jurisdictions in the United States defining the responsibilities of skiers and creating more protection of the skiing industry from liability costs. The B.C. Commission did not overlook the interests of consumers and the *B.C. Report* contains some recommendations restricting the use of comprehensive waivers. Nevertheless the *B.C. Report* is primarily focused on the concerns and viability of the ski operators and other commercial providers. We canvass the major recommendations of the B.C. Commission.

The B.C. Commission recommended some minor changes to *The Occupiers' Liability Act.*[2] First, it recommended that the Act include an express provision that ski operators are not liable for the inherent risks of skiing.[3] Secondly, it recommended that persons who for recreational purposes gratuitously enter premises that have not been designated for recreational use, other than persons who do so at the invitation of the occupier, should be deemed to willingly accept the risks of hazards on the premises.[4] Thirdly, it recommended that operators owe no duty of care to those who ski on runs marked closed or beyond the boundaries of the ski run. The operator's standard of care in such circumstances would be to avoid intentionally injuring a skier and to refrain from acting in reckless disregard for his safety.

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1 The Law Reform Commission of British Columbia Report on *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities* (Report #140, 1994) [*B.C. Report*]. Other Canadian law reform agencies have considered liability for non commercial recreational use of land and have mentioned the use of waivers in commercial activities (see Law Reform Commission of Saskatchewan, Report on *Landowners' Liability For Injuries to Recreational Visitors*, 2006, and Alberta Law Reform Institute, *Occupiers' Liability: Recreational Use of Land*, Final Report no. 81, 2000).

2 *The Occupiers' Liability Act*, R.S.B.C. 1996, c. 337.

3 This recommendation was made in response to a fear that a then recent decision of the Supreme Court in *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 might lead to a liability of ski operators for inherent risks in skiing.

4 *The Occupiers' Liability Amendment Act* S.B.C. 1998, c. 12 s. 1, is reflective of this recommendation. It amended the Act to include provisions stating that a visitor to rural or agricultural premises is deemed to willingly assume all risks arising on the property so long as the visitor has paid no entry fee. The occupier is only liable to such a visitor for intentional harm or harm arising from reckless disregard of the visitor's safety.

The B.C. Commission also analyzed the draft Ski Area Safety Act submitted by the Canada West Ski Areas Association. The centre-piece of the proposed legislation was a set of safety rules for skiers and a statement of the duties of ski operators.[5] On this point the B.C. Commission recommended the enactment of a modified code of conduct for skiers, breach of which would result in temporary or permanent expulsion from the ski area. It also recommended that the duties of operators be developed and promulgated by an advisory body having expertise in skiing safety.[6]

The draft Ski Area Safety Act also contained a very broad definition of the inherent risks of skiing for which the operator would not be liable. A close reading of the language of the draft Ski Area Safety Act led the B.C. Commission to conclude that the effect of the draft legislation would be to create as broad a protection of ski operators as provided by comprehensive waivers. The B.C. Commission concluded that the ski industry ought not to have any special immunity from liability. It would, in its opinion, be difficult to deny similar concessions to the providers of other recreational activities.

In respect of the validity and scope of waivers the B.C. Commission attempted to steer a middle course between validity and unenforceability. It rejected any general prohibition on the use of waivers but recommended that providers be prevented from relying on waivers in respect of certain kinds of risks and certain classes of consumers. First, providers ought not to be able to exempt themselves from risks that are exclusively within the control of the operator/provider over which the consumer has no control. Those risks would include the following:

- malfunction of mechanical equipment and recreational apparatus under the control of or maintained by the operator, including vehicles, other than malfunction resulting from the misuse by a user.

- unsafe operation of mechanical equipment or recreational apparatus, including vehicles, by the operator or its employees.

- unsafe aspects of the structure and condition of an indoor recreational facility that directly affect the safety of users when actually engaged in a recreational activity for which the recreational facility is designed or intended.

- failure of an operator of an outdoor recreational facility to maintain commonly accepted conditions or standards of demarcation, signage, lighting, and monitoring of user activity, for outdoor recreational facilities of a similar size and type.

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5 The obligations of the operators were described by the B.C. Commission as "relatively minimal", see *B.C. Report* at 25.

6 A code of conduct for skiers and ski operators is found in Quebec's *Safety in Sports Act*, R.S.Q. c. S-3.1, CHAPTER V.1.

- unfitness for normal use, at the time of supply or rental, of equipment or apparatus supplied or rented for use in connection with a recreational activity.

- conduct of the operator's employees, acting in the course of their employment, that results in personal injury or death of a user from the source of risk outlined hereinbefore.

- breach by the operator, or by the employee of the operator, of a specific statutory duty or regulatory requirement relating to safety in a particular recreational activity.

The B.C. Commission also recommended that notwithstanding the restrictions on the use of waivers for operator controlled risks a waiver may exclude liability for the physical configuration and condition of the site or facility of a race if the racer has an opportunity to examine the site and is willing to participate in the race.

The B.C. Commission further recommended that waivers be unenforceable in respect of an injury that was not suffered in the participation of the recreational activity, such as food poisoning at the operator's cafeteria, unless it is contained in a separate waiver.

The B.C. Commission also made recommendations restricting the use of waivers against minors and their parents/guardians. It recommended that the practice of requiring a minor or his parent to sign a waiver as a pre-condition to the minor's participation in the recreational activity be prohibited. Similarly any parental indemnity agreements in respect of actions brought by minors should be prohibited. A signed acknowledgment that the activity involves inherent risks that are assumed by the minor should be valid. It would, however, be inadmissible as evidence of assumption of risk insofar as it contains either any terms purporting to waive any cause of action of the minor that may arise or an extended definition of 'inherent risk'.

Although technically beyond the scope of the *B.C. Report* the B.C. Commission addressed the position of non-profit organizations providing recreational services. It recommended that such an organization should retain a general power to exclude its liability to consumers and that of its members in respect of activities of the organization but where such a body offers a recreational activity on a profit seeking basis to the general public, its power to restrict liability be equivalent to that of commercial operators.[7]

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7 These and other related recommendations were consolidated into a draft statute found at page 63 of the *B.C. Report*. Legislation on the enforceability of waivers has been not passed.

CHAPTER 6

STATUTORY CONTROL OF WAIVERS IN ENGLAND, WALES AND NORTHERN IRELAND

In England, Wales and Northern Ireland the use of waivers of liability is controlled by Part 1 of *The Unfair Contract Terms Act.*[1] The pivotal section is section 2(1) which reads:

> A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

Other provisions of the Act clarify and qualify the scope of this section. Section 1 defines the meaning of negligence. It includes the breach of a contractual obligation of reasonable care and skill in the performance of the contract, the breach of a common law duty of care and the breach of the duty of care imposed by occupier's liability legislation. Section 1(3) states that section 2(1) applies only to business liability as defined more precisely in subsections 1(3) (a) and (b). This means that the liability must arise while the defendant was acting in the course of business. There are other restrictions of a technical nature in Schedule 1.[2] Other provisions deal with liability for other loss or damage resulting from negligence, in which case a disclaimer clause is permitted subject to a reasonableness test.[3]

Some guidance can be gleaned from the discussion that took place in the United Kingdom prior to the enactment of *UCTA*. When this Act was introduced, concern was expressed that section 2(1) would prove to be an "unnecessary killjoy" if providers stopped offering recreational activities to the public because the cost of assuming risks could become prohibitive.[4] During Committee discussions and the Lords debate respecting the concerns of the insurance industry to the proposed restrictions on exemption clauses the following observations were made:

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1 *The Unfair Contract Terms Act 1977* (U.K.), 1977, c.50 [*UCTA*].

2 It might also be noted that section 6 prevents a business from exempting itself from implied warranties of quality under the *Sale of Goods Act 1979 (U.K.)*, 1979, c. 54 and the *Supply of Goods (Implied Terms) Act 1973* (U.K.), 1973, c. 13 in a consumer transaction. On that point there is consistency with section 58(1) of *The Consumer Protection Act*, C.C.S.M. c. 200.

3 *UCTA, supra* note 1, sections 2(2) and 11 and submission by James Lee (July 2008). James Lee is a Lecturer at Birmingham Law School and his contributions to this report are acknowledged in Chapter 1.

4 Submission by James Lee (July 2008), referring to LS Sealy, "Unfair Contract Terms Act 1977" (1978) 37 CLJ 15 at 20. Given that this Act has been in effect since 1977, the Commission sought to determine whether section 2(1) has had an impact upon the availability and accessibility of insurance related to sporting and recreational activities. To that end, James Lee made some inquires at the Association of British Insurers regarding insurance provision ramifications, however there has been no indication that this reform became an "unnecessary killjoy" to recreational and sporting activities.

> [T]he ultimate object behind this move is to transfer the responsibility for insurance…The result of this legislation will be that the burden of insurance should, as I think is right, be turned over to the companies who carry out all these activities. If they injure the consumer, the consumer can sue the companies which, if they are wise, will have covered themselves by insurance against liability.[5]
>
> Do I take it that the hon. Gentleman is happy to accept that a small number of individuals should incur costs of frightening proportions because of some misadventure, rather than that some tiny sum should be added, through the generality of business transactions, to the costs of goods and services?[6]
>
> [B]usinessmen may think in future, as no doubt most do already, that it is far better to apply forethought to avoiding being negligent than to avoiding their liability for negligence.[7]

Legislation in the United Kingdom pertaining to consumer protection from unfair commercial practices has expanded in recent years. *UCTA* operates together with *The Unfair Terms in Consumer Contracts Regulations 1999*,[8] which applies to unfair terms in contracts between a seller or a supplier and a consumer. A contractual term falling within the scope of this Regulation that has not been individually negotiated "shall be regard as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer".[9] Even more recently, *The Consumer Protection from Unfair Trading Regulation 2008*,[10] was implemented and applies to unfair commercial practices that affect consumers in connection with the supply of goods and services. With the goal of harmonization with existing consumer protection laws, this Regulation contains a general prohibition on unfair commercial practices, prohibits misleading actions/omissions and aggressive commercial practices that are likely to deceive an average consumer and contains a schedule of specific practices that are deemed unfair and banned in any circumstances.[11]

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5 Submission by James Lee (August 2008), citing House of Lords Debates on the Unfair Contract Terms Bill, Hansard, 23rd May 1977, at col. 1122, as per Lord Denning.

6 Submission by James Lee (August 2008), citing Hansard, 9th March 1977, at col 49, as per Mr. Ward MP.

7 Submission by James Lee (August 2008), citing House of Lords Debates on the Unfair Contact Terms Bill, Hansard, 23rd May 1977, at col. 1133 as per Lord Chancellor, Lord Elwyn-Jones.

8 *The Unfair Terms in Consumer Contracts Regulations 1999*, S.I. 1999/2083.

9 *Ibid.*, section 5(1).

10 *The Consumer Protection from Unfair Trading Regulation 2008*, S.I. 2008/1277.

11 Hannah Rigby, "United Kingdom: What's Unfair About A Contract? Taking Care To Be Fair" (24 October 2008), online: Mondaq http://www.mondaq.com/article.asp?articleid=68520. This article suggests that the 'freedom of contract' principle remains important in most commercial arm's-length transactions. However, for consumer contacts in the United Kingdom this idea has been eroded by legislation.

This legislation may not provide a template for reform in Manitoba because of the technical nature of the legislation arising from its inter-relationship with other English legislation but it does provide a precedent for the prohibition of some waivers of liability and unfair behavior and offers some evidence that this option is a practical and tried response for the protection of consumers.

CHAPTER 7

WAIVERS - ARGUMENTS FOR AND AGAINST ENFORCEABILITY

The uneven judicial decision making on the validity/enforceability of waivers may suggest a fundamental ambivalence about the use of waivers in sporting and recreational activities and the social value in allowing providers to allocate the cost of their negligent conduct to consumers. The central question is whether the use of waivers in sporting and recreational activities in the twenty-first century should be prevented or restricted. The courts have not been free directly and transparently to answer that question. They are constrained by the presumptive enforceability of contracts, limited by the conventional contractual principles that control fairness in contracting and are burdened by the weight of authority. This conventional approach has not, however, proved to be satisfactory for either providers or consumers. There is no certainty of the efficacy of the waiver contract for the providers and this leads to prolonged settlement wrangles and litigation. The reasonable expectation of consumers that reasonable care will be taken to protect their safety may be defeated. In this chapter we address directly the advantages and disadvantages of the use of waivers.

A. ARGUMENTS FAVOURING ENFORCEABILITY

1. It may be argued that there is no compelling reason to isolate contracts of waiver from other contractual relationships. Where adult persons freely and voluntarily enter into agreements whereby they receive benefits, undertake obligations or provide immunities those agreements are presumptively enforceable. Enforceability as a general rule does not depend upon each party having a full understanding of his or her rights and obligations flowing under the contract. Contracts of waiver are typically entered into by adult persons who seek the benefits of sporting or recreational activities and who have some level of awareness that some kind of release or waiver is a part of the agreement. They normally have an opportunity to read the waiver or ask for additional information regarding its meaning. It is disingenuous for consumers who sign waivers to claim that there was a total lack of knowledge, or understanding of the waivers, that there was no opportunity to read them and they should not be bound by them. They are the authors of their own misfortune. Contract law rightly encourages self reliance and places personal responsibility on the consumer to determine if the contract is in his/her best interest before entering it.

2. Contract law and consumer protection legislation contain sufficient principles to allow the courts to exercise social control on the enforcement of contractual waivers and protect consumers from unduly harsh terms and resulting unfairness. These measures which have been canvassed earlier in this report are adequate to the task. They have been fashioned by the collective wisdom of the judiciary and permit a fair balance between freedom of contract and social control.

3. It is less likely today that a consumer will be surprised by an unexpected waiver than in the past. First, the use of waivers is more prevalent today and it is likely that many of the consumers are repeat customers. This suggests that some form of waiver is reasonably expected by consumers of these kinds of activities. Secondly, more providers are giving adequate notice of the waiver. A variety of techniques are being used including separate waiver documents, large font, bold or italicized print, colour print, multiple signatures, initialing of special clauses and witnessed signing to bring to the attention of the consumer the nature and consequences of the document.

4. The use of waivers is particularly important to voluntary organizations and associations with limited resources that may not be able to assume the cost of their employees' negligence. It may also be difficult to secure affordable liability insurance.

5. The tort/insurance system of accident compensation can be an economically burdensome, slow, uncertain and uneven system of compensation. It is not unreasonable for providers to allocate negligence losses to consumers who are thereby encouraged to protect themselves either by adopting their own safety precautions or by the purchase of first-party disability and life insurance.

6. The great majority of consumers are advantaged by the use of waivers because providers who are unburdened by tort losses can provide recreational and sporting activities at a lower cost.

B. ARGUMENTS AGAINST ENFORCEABILITY

1. The primary reason against the enforceability of waivers is the continuing disparity of information, knowledge and understanding of the function of waivers between providers and their legal advisers and consumers. Much of the misunderstanding centres on the legal dichotomy between risks that are inherent in the activity and are unavoidable by the exercise of due care and risks created by the negligence of the provider or its employees. It is likely that consumers tend to focus on the inherent risks of which they have good knowledge and a willingness to assume. Indeed those are the risks that make many activities attractive and provide the challenge that the consumer seeks. Consumers are less likely to consider the possibility of the provider's negligence. Consequently it is likely that consumers in signing waivers believe that they are assuming only inherent risks. That is not, of course, the purpose of most waivers. The purpose of most waivers is to immunize the provider and its employees from liability for risks generated by their negligence. The confusion is understandable. Even the Supreme Court has expressed this dichotomy in confusing language. It wrote in *Dyck v. Manitoba Snowmobile Association Inc.*[1]

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[1] [1985] 1 S.C.R. 589 at para. 10 [*Dyck v. Manitoba Snowmobile Association*].

> ... the races carried with them *inherent dangers* of which the appellant should have been aware and it was in no way unreasonable for an organization like the Association to seek to protect itself against liability from suit for damages arising out of *such dangers*. (emphasis added)

Snowmobile racing is dangerous and the inherent risks were obvious and acceptable to Dyck but the risk at issue was that generated by the reckless act of Woods intruding on to the track thereby obstructing the racers. This was not an inherent danger and it is doubtful that Dyck understood that he was assuming such a risk.

The confusion is exacerbated by the fact that negligence law may place providers under an obligation not only to conduct the activity with due care but also to warn the consumer of inherent risks. Some providers try to foreclose the latter claim by writing into the waiver additional clauses claiming that the consumer knows of these inherent risks and/or has been informed of them. The release at issue in *Sibley v. British Columbia Custom Car Association*,[2] for example, states in Clause 5 "[the consumer] acknowledges that THE ACTIVITIES OF THE EVENT(S) ARE VERY DANGEROUS and involve the risk of serious injury and/or death..." Consequently the waiver may deal with both inherent and negligent risks to the confusion of the consumer.

2. It may be both responsible and an exercise in due diligence for a consumer to read and understand the waiver but such an expectation runs contrary to human nature, general practice and the reality of the circumstances in which waivers are signed. First, few people anticipate that they will suffer catastrophic injury as a consequence of another's negligence. The chance is at best perceived as remote and in respect of young adults who are frequent consumers of these activities, it is likely perceived as virtually non-existent. Secondly, the promotional literature of many of these activities tends to minimize the risks involved. The point was alluded to in the report of the Law Reform Commission of British Columbia on Recreational Injuries.[3] The Commission wrote at page 44:

> Advertising by recreational industries is characterized by powerful images emphasizing adventure and enjoyment. Not surprisingly, we have come across none that places an equal emphasis on danger.

Thirdly, the consumer is often pre-sold on the activity. The decision to sky-dive, for example, has been made prior to saving the money, arranging the event, travelling to the site and receiving instruction. It is most unlikely that the chain of events will be terminated when the waiver is produced for signature. It will be perceived (wrongly) as little more than a formality.

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2 2005 BCSC 509, 138 A.C.W.S. (3d) 398.

3 Law Reform Commission of British Columbia Report on *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities* (Report #140, 1994) [*B.C. Report*].

3. Even when the formal requirements of notice are met, waivers are difficult to read with understanding. Their language, format and length are often intimidating. Many contain repetitive language and clauses and many continue to use legal jargon. Some are very verbose and challenge the most conscientious and educated layperson. One judge has observed:[4]

> ...on the evidence before me in this case only one of eight persons who signed this waiver of liability knew what it meant. These persons were of considerable education and experience.

Some waivers are very long because lawyers are responding to all the various ways a waiver may be defeated and seeking to draft an ironclad waiver that will satisfy every legal requirement and withstand any attempt to defeat it. It is unrealistic to expect consumers to spend time deciphering a document when imminent fun beckons. The following is a telling passage from the transcript of evidence in *McQuary v. Big White Ski Resort Ltd.*[5]

> Q. Do you recall anything else about what was contained on the ticket...?[waiver].
>
> A. Not right at the time. We were in...we were concentrating more on getting on the mountain skiing, than we were on reading the tickets.

4. In the context of waivers, the notion of freedom of contract has limited application. There is freedom to enter or abstain from the contract but there is no freedom to negotiate terms in the consumers' interests. The waiver is proffered on a take it or leave it basis and if you wish to participate in the activity you take it. This encourages the consumer not to read the waiver since there is no opportunity to change it. It becomes an accepted formality.

5. For those who are injured the contract of waiver may be characterized as grossly unfair. It was noted earlier that in *Dyck v. Manitoba Snowmobile Association*, for example, the 19 year old consumer paid a $25 entrance fee and surrendered his right to sue for negligence valued by the Court of Appeal at $60,000, to enter a race where the prize money was $200. This was a very bad bargain but one of a kind that is routinely being entered into by members of public.[6]

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4 *Ochoa v. Canadian Mountain Holidays Inc.*, [1996] B.C.J. No. 2026 (B.C.S.C.) (QL) at para. 135.

5 (1993), 42 A.C.W.S. (3d) 940 (B.C.S.C.) at para. 10.

6 This point is made by D. Vaver, "Unconscionability: Panacea, Analgesic or Loose Can(n)on?" (1988) 14 Can. Bus. L.J. 40.

6. Waivers negate the accident prevention function of negligence law. The duty of care is designed to encourage cost effective steps to protect the safety of persons. Waivers can create a license to be negligent without any accountability. The public would not tolerate such an arrangement with their physicians, dentists, lawyers, or with their food suppliers or restauranteurs. Each of these persons may have the legal power to contract out of their duty of care but it would be professionally and socially unacceptable. Social norms, community expectations and competition in the market place may operate well in respect of these activities but have failed in the arena of sporting and recreational activities.

7. Waivers allocate the cost of negligent conduct not solely to the consumer but also to society at large through the provision of health care, disability services and social assistance to those who are severely injured.[7] It is better to allocate that loss to the provider/enterprise which can in turn spread the loss to all consumers who participate in the activity through the mechanism of pricing.

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7 See J. Neumann, "Disclaimer Clauses and Personal Injury" (1991) 55 Sask. L.R. 312 at 329.

CHAPTER 8

OPTIONS FOR REFORM

The options for reform of the law relating to waivers of liability for sporting and recreational injuries range from greater judicial control of waivers to preventing providers from relying on some or all waivers of liability.

A. JUDICIAL CONTROL

This option favours providing judges with more effective and more direct methods to control the use of waivers by both business and non-profit providers of sporting and recreational services. Legislation might give judges the power to strike down those waivers which infringe some standard of fair dealing. A number of standards may be used. Waivers may fail if they are unreasonable, unfair, harsh, unduly burdensome, and stringent, against public policy or an abuse of bargaining power. The advantage of such an approach would be to replace covert control techniques with transparent devices. It would allow a case by case scrutiny sensitive to the facts and circumstances of the situation. A disadvantage is that case by case judicial control is expensive, time-consuming and uncertain. It may also be pointed out that the judiciary currently has the power to negate a contract on the basis of unconscionability or as contrary to public policy and have shown little inclination to use that power. The courts might give a robust interpretation to a concept such as reasonableness but that is not assured. It should also be emphasized that *The Occupiers' Liability Act*[1] already has a reasonableness standard entrenched in section 4(2).

B. UNENFORCEABILITY OF WAIVERS

A more radical option is to declare legislatively that waivers are unenforceable. There are a number of options in respect of the extent of such an approach.

First, legislation might prevent business providers of sporting or recreational activities from relying on a waiver. A variation to this option is to limit the power to waive liability to certain kinds of risks or classes of consumers. Secondly, legislation of this kind might also extend to non-profit providers.

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1 C.C.S.M. c. 08 [*The Occupiers' Liability Act*].

1. Business Providers of Sporting and Recreational Activities

(a) Unenforceability

A strong case for the unenforceability of waivers used by business providers of recreational and sporting activities can be made. First, it is reasonably expected that a business provider will have experience and expertise in delivering the activities and knowledge of safe practice. Secondly, the accident costs of a business are more easily spread by means of pricing mechanisms than those of non-profit providers. Thirdly, business providers have stronger bargaining power than consumers and can impose comprehensive waiver clauses without any real consent of the consumer. Fourthly, business providers should have an incentive to adopt efficacious safety measures. Fifthly, consumers will be protected from accident losses generated by the negligence of the provider and its employees'. Sixthly, the duties of care resting on the providers are neither onerous nor stringent being no more than the common duty of care for others. Seventhly, such a restriction would be compatible with the general policy foundation of existing consumer protection legislation in Manitoba. One method of implementation of such an option would be to amend *The Business Practices Act*[2], which would be compatible with its general provisions that target consumer transactions. A 'supplier' under *The Business Practices Act* is a business enterprise and this Act applies to transactions between suppliers and consumers including services for the "consumer's personal, family or household use". In this way, business providers using waivers would be subject to the contractual, administrative and penal remedies found in *The Business Practices Act*.

Another method is to amend *The Consumer Protection Act*[3] by adding as section 58(6)(1):

> Notwithstanding any agreement to the contrary there shall be implied in every retail sale of services of a recreational or sporting nature, on the part of the seller, that the services shall be provided with reasonable care and skill.

(b) Partial Unenforceability

A variation of this option is to limit the power to rely on waivers to certain kinds or classes of negligent conduct or in respect of certain categories of consumers.

As discussed earlier, the concept of limiting the enforceability of waivers to certain kinds of negligence is found in the Law Reform Commission of British Columbia report on *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities*,[4] where it was recommended that a

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2 C.C.S.M. c. B120 [The Business Practices Act].

3 C.C.S.M. c. C200 [*The Consumer Protection Act*].

4 Law Reform Commission of British Columbia Report on *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities* (Report #140, 1994) [*B.C. Report*].

business provider should not be able to avoid liability for risks which lie within the exclusive control of the provider. An operative waiver would continue to protect the provider in respect of other acts of negligence.

This option increases the protection of consumers to a considerable degree. A cursory analysis of the cases in Appendix A indicates that about a third dealt with a 'non-excludable risk' as defined in the *B.C. Report*. A significant disadvantage of this approach is that it adds a further layer of legal analysis to the current situation. The validity and applicability of the waiver under conventional principles remains. Added to that is an analysis of the kind of risk involved.

Implementation of such an option could be made by amendment of either *The Business Practices Act* or *The Consumer Protection Act*. Since the use of a list of described non-excludable risks entails multiple problems of interpretation it may be preferable to use one more general term such as 'risks exclusively within the control of the operator/provider'.

The concept of limiting the use of waivers in respect of certain classes of consumers is also found in the *B.C. Report*. It sought, for example, to remove the uncertainty in respect of injured minors by recommending that waivers given by minors or signed by parents on behalf of minors be unenforceable.[5] The B.C. Commission also recommended that indemnity agreements signed by parents to protect operators for any losses incurred by them in consequence of a provider's liability to their child also be unenforceable. The Draft Act of the *B.C. Report* at page 65 is a guide:

> Notwithstanding any provision of *The Occupiers' Liability Act* to the contrary a seller of sporting or recreational activities must not require:
>
> (i) a minor or a minor's parent or guardian to agree to a term excluding the seller's liability for personal injury of death of the minor, or
>
> (ii) a parent or guardian of a minor to agree to indemnify the seller of sporting or recreational activities in respect of any damages or other amount to which a minor may become entitled or an expense associated with a legal action on behalf of the minor.

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5 Another concept of limiting the use of waivers to certain classes of consumers was suggested by the English and Scottish Law Commission in a report on Exemption Clauses, wherein it was suggested that exemption clauses and notices should be declared void only in circumstances where persons are in need of protection or in a particularly weak or reliant position. See *Exemption Clauses: Second Report* (Law. Com. No. 69, Scot. Law. Com. No. 39) (HC 605).

(c) Non- Profit Providers of Sporting and Recreational Activities

The complete or partial unenforceability of waivers by non-profit providers of sporting and recreational activities raises more difficult questions.

Many sporting and recreational activities are delivered through non-profit bodies and their volunteers and the use of comprehensive waivers is common. Some of these bodies may, however, lack the resources to buy liability insurance to protect them and their volunteers. In the absence of comprehensive liability insurance it may be difficult to secure the volunteers who provide valuable services. Moreover, some of these bodies have a small adult membership all of whom may have a direct say in the way in which the organization is run. They may have freely agreed among themselves not to hold each other liable for negligent conduct. Such an agreement is much less offensive than the take it or leave it approach of business providers.

There is, however, no uniformity in the size, nature, function or sophistication of non-profit bodies. They range from small numbers of adults involved in a softball or curling league, to community clubs that have a large adult and child membership, to schools and universities fielding sports teams and arranging field trips, to municipalities supplying swimming facilities to sophisticated organizations that may be organizing events in which large numbers of the public may be involved, such as the Manitoba Marathon or the 'Run for a Cure'. Some organizations have a paid staff and are not greatly different in their operation from a business provider. Some may well be able to afford liability insurance by spreading the cost through membership and participation fees. Some may not.

There are a number of approaches to the use of waivers by non-profit bodies. The first option is to continue to allow all non-profit providers to use comprehensive waivers to protect the organization and its volunteers. There is no doubt of the societal importance of these providers and it may be argued that care must be taken not to impose undue burdens on them resulting in the loss of these service providers.

The second option is to make all waivers used by non-profit providers unenforceable. This would force the providers to secure adequate liability insurance and build the cost of comprehensive liability insurance into their membership or activity fees. This option may ultimately be in the best interests of providers, volunteers and consumers. The provider and volunteers are better protected by liability insurance from financial losses (given the fact that waivers are not always effective) and consumers are protected from shouldering losses caused by the negligent conduct of providers and their volunteers.

Similar to the case for business providers, the third option for non-profit providers is to partially restrict the use of waivers to certain kinds of risks or activities, or classes of consumer.[6]

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6 *B.C. Report*, *supra* note 4.

First, it is possible to prevent the use of waivers to exclude liability for risks that are exclusively within the control of the provider. This option enjoys the advantages and disadvantages alluded to earlier with reference to business providers. Secondly, it is possible to prevent the use of waivers in respect of certain activities of the provider. In this respect, the *B.C. Report* recommended that when a non-profit body offers a recreational opportunity on a profit seeking basis to the general public as well as its own members, it should be treated as a business provider in respect of non-members.[7] A simpler formulation would be to treat all non-profit providers who, in addition to providing services to their members, provide services to members of the general public as business providers in respect of non-member consumers. The rationale for this option would appear to be that non members did not participate in the agreement of members not to sue one another and, furthermore, that providers of services to the public are likely to be operating in a similar manner as business providers. Thirdly, it is possible to restrict the use of waivers in respect of certain classes of consumers. Providers may be prevented from relying on waivers against the claims of minors and from relying on indemnity agreements with their parents.

The implementation of any of these options would probably require a stand alone legislative instrument. *The Business Practices Act* and *The Consumer Protection Act* both deal with consumer transactions between business entities and consumers. It does not deal with non-profit providers.

C. BROADER PERSPECTIVES

This report deals with the use of waivers in sporting and recreational activities. There are wider dimensions to this issue. They may be identified by a number of questions. Should all business enterprises be prevented from enforcing waivers of liability for personal injury or death against the consumers of their goods and services? Should the defence of voluntary assumption of risk in negligence and its mirror image in subsection 3(3) of *The Occupiers' Liability Act* (whether or not based on a waiver) be abolished? Would it be good policy to declare that the common law duty of care is a non-excludable, non-delegable duty of care in respect of the personal safety of others? Is there ever a compelling justification to license negligent conduct? These questions lie beyond the scope of the project but they may inform the debate.

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7 *Ibid.*

CHAPTER 9

THE CONSULTATION PROCESS

In March 2008, the Manitoba Law Reform Commission distributed a consultation letter and questionnaire to various business and non-profit providers of sporting and recreational activities, consumer organizations, members of the insurance industry and lawyers practising in the area of civil litigation. Submissions were sought on a range of issues relating to the use of waivers of liability for sporting and recreational activities, including:

- The prevalence of waivers of liability within sporting and recreational activities;
- The accessibility of third party liability insurance; and
- The perceived impact that a restriction on the use of waivers of liability may have upon the cost of third party liability insurance and upon consumer participation costs.

Interested persons and organizations were invited to express their views on these matters. A list of persons and organizations that made written submissions is contained in Appendix B at the end of this report.[1] This chapter discusses the submissions and considers the varying and sometimes competing interests.

All of the submissions from business providers of sporting and recreational activities indicated that waivers of liability are required from participants and the vast majority of these respondents indicated that their insurers' require that such waivers be obtained. Among the non-profit providers of sporting and recreational activities, the practice of requiring waivers of liability from participants varies, and approximately 75% of these respondents indicated that they require waivers of liability from participants. The responses from the non-profit providers of sporting and recreational activities further indicated that although waivers of liability are not required by their insurers', they are encouraged.

With one exception, all of the respondents from the business and non-profit providers of sporting and recreational activities indicated that they carry third party liability insurance.[2]

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1 The Commission's legal counsel had telephone discussions with a Manitoba consumer advocacy organization that endorsed a need for consumer protection from comprehensive waivers of liability for personal injury or death in sporting and recreational activities, but regretfully, this organization did not provide us with a written submission. It should also be noted that despite our efforts to obtain written submissions from injured victims of negligence, responses from this sector were not provided to the Commission.

2 In one case, a Manitoba business owner indicated that he deliberately operates without third party liability insurance in order to remain judgment proof. Fortunately for consumers in Manitoba, this situation appears to be anomalous. While any conclusion from this information is merely anecdotal, it is interesting to note that liability insurance is apparently accessible for both business and non-profit activity providers, including for those who do not use waivers as a means of excluding liability for negligence.

There was opposition to any proposed legislative restrictions on the use of waivers of liability for sporting and recreational activities. It was suggested that waivers deter frivolous lawsuits, are necessary to respond to unpredictable liability findings and enable accessible and affordable liability insurance. It was further suggested that a restriction on the use of waivers would increase the frequency and severity of negligence claims, that insurance premiums would increase in order to offset the potential for liability, that this could result in higher user or participation costs and that insurers may potentially decline to underwrite in Manitoba.[3]

During the consultation process it was submitted that waivers not only assist providers of sporting and recreational activities by limiting their liability through contractual provision, but also that waivers are essential to the risk management process by warning consumers of inherent risks of activities and that in some cases are used to obtain assumptions of risk from consumers.

Some sporting and recreational activity providers indicated that they are "high risk" or "extreme" activities and view waivers of liability as particularly essential for their operation. Certainly activities considered to be of a higher risk can be carried out with reasonable care and the Commission is not in favor of isolating specific sporting and recreational activities depending upon their actual or perceived degree of risk. This type of distinction would essentially result in different standards of care being created within the sporting and recreational industry, to the detriment of the consumer.

Finally, throughout the consultation process, concerns were expressed that any restriction or limitation on comprehensive waivers would cause floodgates of liability to open for sporting and recreational activity providers. In response to this fear, it must be emphasized that if the use of

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3 Similar concerns were submitted to the Law Reform Commission of British Columbia for its report on *Recreational Injuries: Liability and Waivers in Commercial Leisure Activities*, (Report #140, 1994). In its consideration of the potential insurance ramifications, the following compelling observations were made: "Throughout work on this reference, we have been aware that imposing any limits whatsoever on the scope of comprehensive waivers in the public interest might cause insurers to cease offering liability coverage to recreational industries, and to the skiing industry in particular. While we came upon no conclusive evidence that the viability of the skiing industry or its ability to insure is threatened by the existing level of litigation, and none was offered, the possibility that insurers could leave the field cannot be discounted entirely. Claims experience and the relative attractiveness of a line of coverage to insurers have never dictated substantive rules of civil responsibility, however. If they did, we would not have a principled legal system, but one based instead on the ebb and flow of the insurance cycle."

waivers of liability is restricted or limited, liability is far from automatic. A provider of sporting or recreational activities will only be held liable if they are found to be negligent. Not every accident or injury will result in liability.[4]

4 Submission by James Lee (August 2008).

CHAPTER 10

RECOMMENDATIONS

The threshold issues for the Commission to consider have been whether there should be legislative restrictions on the use of waivers of liability for personal injury or death resulting from negligence in sporting and recreational activities, and if so, whether such reform should embody full or partial restrictions. This report identifies a range of potential limitations on the use of waivers and reviews different positions that have been adopted in other jurisdictions, either legislatively or proposed through law reform commissions.

The Commission has considered the interests of providers of sporting and recreational activities, consumers, injured victims of negligence and taxpayers, and has endeavored to make recommendations that achieve an appropriate balance for all stakeholders. The Commission has also considered the potential ramifications upon insurance provision and has been mindful of the concerns expressed during the consultation process.

The Commission does not believe that waivers of liability should be used to immunize providers from liability for negligence and to require participants essentially to assume the inherent risks of activities as well as the risk that a sporting and recreational provider may be negligent in the performance of their duties.[1]

The following is a discussion of specific reforms that the Commission considers desirable.

RECOMMENDATION 1

Manitoba should enact legislation that provides that no waiver of liability for personal injury or death resulting from negligence in sporting and recreational activities is valid or binding and that the use of such a waiver of liability is prohibited.

While the Commission encourages the implementation of legislative prohibitions on the use of waivers of liability, the Commission is taking an unusual step by making an alternative recommendation that partially limits the use of waivers of liability. The Commission believes that

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1 Submission by James Lee (July 2008 and August 2008). Mr. Lee observed that if waivers of liability are unenforceable, insurers (and activity providers) would no longer have to assess the risk of exposure based upon a clause that may or may not be held effective by the courts. This certainty might be viewed by some stakeholders as advantageous. In Jeffrey J. Neumann, "Disclaimer Clauses and Personal Injury" (1991), 55 Sask. L. Rev. 312, it was noted that under the current scheme, "the prospect that a disclaimer clause will be invalidated means that participants will not be assured of receiving compensation". In this same article it was suggested that in contrast, if waivers were invalidated by legislative reform, participants would be assured of "receiving personal injury compensation from negligent defendants", even though they will pay increased prices.

stronger and more direct controls on the use of waivers of liability can achieve an improved balance between consumer protection and the interests of sporting and recreational providers. The Commission prefers the policy contained within the first recommendation above, but believes that the following alternative recommendation would provide enhanced consumer protection in Manitoba.

RECOMMENDATION 2 (Alternative Recommendation)

Manitoba should enact legislation that provides that no waiver of liability for personal injury or death resulting from negligence in sporting and recreational activities is valid or binding unless in all the circumstances of the case it is fair and reasonable and, without limiting the circumstances to be considered in any case, in determining the fairness and reasonableness of a waiver of liability, the circumstances to be considered shall include

(a) the representations made to the consumer by the provider of sporting and recreational activities, or their agent, employee, or volunteer, at the time the waiver of liability is obtained;

(b) ***the steps taken to bring the waiver of liability to the attention of the consumer, including***

(i) the timing and manner in which the waiver of liability is presented to the consumer, and

(ii) the format and comprehensibility of the waiver of liability;

(c) the hazard causing the personal injury or death, including whether such hazard arises from a risk exclusively under the control of the activity provider; and

(d) the relationship between the activity provider and the consumer, including whether the consumer is a person in need of protection or in a particularly reliant position, including

(i) whether the consumer is dependant for their personal safety on the skill and care of the activity provider, and

(ii) the relative weakness of the consumer's bargaining position in relation to the waiver of liability.

Enforcement

A critical distinction must be made between legislation that denies legal effect to waivers of liability as opposed to an actual prohibition on the use of waivers. Should a waiver of liability be declared void or ineffective rather than prohibited, its ongoing use may still continue. This could

have the profound effect of dissuading consumers from proceeding with legitimate claims,[2] and creates the potential for consumers to be misled, either deliberately or inadvertently.

The Commission prefers a statutory model whereby the use of waivers of liability for personal injury or death resulting from negligence in sporting or recreational activities is prohibited, and a contravention or failure to comply with this restriction is regarded as an offence. This method of enforcement is consistent with existing statutory regimes in Manitoba designed to protect the interests of consumers where any person who contravenes or fails to comply with the relevant legislative provisions is guilty of an offence and liable on summary conviction to fines or imprisonment or both.[3] This method of enforcement would only be applicable to Recommendation 1 respecting a prohibition of waivers of liability and would not be compatible with Recommendation 2 (alternative recommendation) respecting increased controls on the use of waivers of liability.

RECOMMENDATION 3

If Recommendation 1 is implemented, Manitoba should enact legislation that provides that any person who contravenes or fails or neglects to comply with the prohibition on the use of waivers of liability for personal injury or death resulting from negligence in sporting and recreational activities is guilty of an offence and liable, on summary conviction to penalties.

Non-profit providers

Consideration was given to non-profit providers of sporting and recreational activities excluding liability, either by means of fully or partially enforceable waivers of liability. The consultation process demonstrated that the non-profit sector is a significant contributor of sporting and recreational activities in Manitoba. The Commission is concerned that differentiating between business and non-profit providers of sporting and recreational activities in such a manner could confer an unfair competitive advantage to the non-profit sector or result in a different standard of care being put into practice.[4] From a consumer protection and public safety perspective, it is

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2 Submission by James Lee (July 2008). James Lee notes that in the United Kingdom, the use of exclusion clauses have continued because their use is not illegal and their inclusion in a contract may have a chilling effect in deterring a legitimate claim.

3 Pursuant to s. 94(1) of *The Consumer Protection Act*, C.C.S.M. c. C200, an individual is liable upon summary conviction for a first offence to a fine of not more than $10,000 or imprisonment for a term of not more than a year, or both, and liability for each subsequent offence increases to a fine of not more than $50,000 or imprisonment for a term of not more than three years, or both. In the case of a corporation, liability for a first offence is a fine of not more than $25,000, and for each subsequent offence this increases to a fine of not more than $100,000. The penalty provisions pursuant to s. 33(1) of *The Business Practices Act* C.C.S.M. c. B120 are more severe, whereby an individual is liable upon summary conviction for a first offence to a fine of not more than $25,000 or imprisonment for a term of not more than 12 months, or both, and liability for each subsequent offence increases to a fine of not more than $100,000 or imprisonment for a term of not more than 36 months, or both. In the case of a corporation, liability for a first offence is a fine of not more than $100,000 and this increases for each subsequent offence to a fine of not more than $1,000,000.

4 Submission by James Lee (August 2008).

questionable whether the profit status of a provider should have a bearing on an injured consumer's ability to recover compensation for negligence. By not making a distinction between business and non-profit providers of recreational and sporting activities, the Commission believes that consumers are equally protected regardless of the profit status of activity providers.

RECOMMENDATION 4

The implementation of legislative prohibitions or limitations upon the use of waivers of liability for personal injury or death resulting from negligence in sporting and recreational activities should be applicable to business and non-profit providers.

Format of Waivers

A number of waivers of liability were reviewed during the research phase of this project. As noted earlier, there are wide variations in the format, language and breadth of waivers, ranging from user-friendly language to convoluted legalese, from forms requiring an acknowledgment of notice and signature to release terms printed on the back of admission tickets and from releases limited to certain kinds of risks to comprehensive waivers of all potential liability in any circumstance.

Consideration was given to the viability of a user-friendly or plain-language form of waiver and whether this was an area that could benefit from law reform. However in practice, if waivers are permitted, they would likely still be obtained as a condition of participation and the underlying policy concerns respecting waivers of liability would not be addressed. The Commission believes that concerns respecting the form of a waiver would be eliminated if the full restriction proposed in the first recommendation is implemented and that such concerns would be addressed, in part, by the second recommendation which includes consideration of the format and comprehensibility of a waiver of liability.

Minors

Given the dubious validity of waivers of liability and indemnity agreements obtained from or on behalf of minors, and having regard to the public policy objections discussed earlier, the Commission believes that an express restriction on the use of these instruments respecting minors ought to be implemented.

RECOMMENDATION 5

Manitoba should enact legislation that provides that providers of sporting or recreational activities must not require:

(a) a minor or a minor's parent or guardian to agree to a term excluding the provider's liability for personal injury or death of the minor, or

(b) a minor or a minor's parent or guardian to agree to indemnify the provider of sporting or recreational activities in respect of any damages or other amount to which a minor may become entitled or an expense associated with a legal action on behalf of the minor.

Risk Management

Throughout the consultation process, providers of sporting and recreational activities indicated that waivers of liability are utilized to warn and advise participants about inherent risks of activities and the Commission appreciates this desire for private risk management. It must be emphasized that a statutory restriction or limitation on the use of waivers of liability would not preclude activity providers from cautioning or explaining inherent risks to consumers, nor would it preclude activity providers from distributing relevant and appropriate information to consumers. There is an element of risk that consumers of sporting and recreational activities must accept and the Commission supports and encourages providers of sporting and recreational activities to caution and notify participants of inherent risks and hazards. This can be accomplished through the continued use of an acknowledgment and assumption of inherent risk from consumers, provided that this does not become a disguised form of waiver of liability for personal injury or death resulting from negligence.

RECOMMENDATION 6

Providers of sporting and recreational activities should be encouraged to obtain an acknowledgment and assumption of inherent risk from consumers, and in the case of minor consumers, from their parents' or guardians'.

Implementation

This report considers the relevant provisions of *The Business Practices Act* and *The Consumer Protection Act* that could be of avail to a consumer in a dispute relating to a waiver of liability for personal injury or death in a sporting and recreational activity and canvasses possible legislative amendments to these statutes. *The Business Practices Act* and *The Consumer Protection Act* do not appear to encompass non-profit entities.

To ensure that the subject recommendations are applicable to all providers of sporting and recreational activities, it is suggested that the recommendations contained in this report be implemented through stand alone legislation that expressly states that non-profit providers of sporting and recreational activities are included within the scope of the legislation.

This proposal for stand alone legislation is not intended to derogate in any way from the rights and remedies of consumers pursuant to *The Business Practices Act* and *The Consumer Protection Act*. Rather, new legislation could provide an alternative remedy for a consumer and impact directly upon transactions between business and non-profit providers of sporting and recreational activities and consumers.

RECOMMENDATION 7

Manitoba should enact stand alone legislation to implement the recommendations made in this report.

Public Education

The Commission believes that public awareness initiatives would be beneficial for both consumers and providers of sporting and recreational activities. Material should be made available explaining the restrictions upon the use of waivers of liability for personal injury or death resulting from negligence in sporting and recreational activities. The nature of such an explanation will depend upon whether a prohibition is implemented pursuant to the first recommendation or whether a limitation is implemented pursuant to second recommendation. In time, an effective public education process should assist consumers and providers in becoming aware of their rights in connection with sporting and recreational activities.

RECOMMENDATION 8

The Government of Manitoba should conduct public awareness initiatives with respect to waivers of liability for personal injury or death resulting from negligence in sporting and recreational activities, including preparing and distributing educational material that explains the restrictions and rights related to the use of waivers of liability under the new legislation.

CHAPTER 11

LIST OF RECOMMENDATIONS

1. Manitoba should enact legislation that provides that no waiver of liability for personal injury or death resulting from negligence in sporting and recreational activities is valid or binding and that the use of such a waiver of liability is prohibited. (p. 43)

2. (Alternative Recommendation) Manitoba should enact legislation that provides that no waiver of liability for personal injury or death resulting from negligence in sporting and recreational activities is valid or binding unless in all the circumstances of the case it is fair and reasonable and, without limiting the circumstances to be considered in any case, in determining the fairness and reasonableness of a waiver of liability, the circumstances to be considered shall include

   (a) the representations made to the consumer by the provider of sporting and recreational activities, or their agent, employee, or volunteer, at the time the waiver of liability is obtained;

   (b) the steps taken to bring the waiver of liability to the attention of the consumer, including
      (i) the timing and manner in which the waiver of liability is presented to the consumer, and
      (ii) the format and comprehensibility of the waiver of liability;

   (c) the hazard causing the personal injury or death, including whether such hazard arises from a risk exclusively under the control of the activity provider; and

   (d) the relationship between the activity provider and the consumer, including whether the consumer is a person in need of protection or in a particularly reliant position, including
      (i) whether the consumer is dependant for their personal safety on the skill and care of the activity provider, and
      (ii) the relative weakness of the consumer's bargaining position in relation to the waiver of liability. (p. 44)

3. If Recommendation 1 is implemented, Manitoba should enact legislation that provides that any person who contravenes or fails or neglects to comply with the prohibition on the use of waivers of liability for personal injury or death resulting from negligence in sporting and recreational activities is guilty of an offence and liable, on summary conviction to penalties. (p. 45)

4. The implementation of legislative prohibitions or limitations upon the use of waivers of liability for personal injury or death resulting from negligence in sporting and recreational activities should be applicable to business and non-profit providers. (p. 46)

5. Manitoba should enact legislation that provides that providers of sporting or recreational activities must not require:

   (a) a minor or a minor's parent or guardian to agree to a term excluding the provider's liability for personal injury or death of the minor, or
   (b) a minor or a minor's parent or guardian to indemnify the provider of sporting or recreational activities in respect of any damages or other amount to which a minor may become entitled or an expense associated with a legal action on behalf of the minor. (p. 47)

6. Providers of sporting and recreational activities should be encouraged to obtain an acknowledgment and assumption of inherent risk from consumers, and in the case of minor consumers, from their parents' or guardians'. (p. 47)

7. Manitoba should enact stand alone legislation to implement the recommendations made in this report. (p. 48)

8. The Government of Manitoba should conduct public awareness initiatives with respect to waivers of liability for personal injury or death resulting from negligence in sporting and recreational activities, including preparing and distributing educational material that explains the restrictions and rights related to the use of waivers of liability under the new legislation. (p. 48)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 30th day of January 2009.

"Original Signed by"
Cameron Harvey, President

"Original Signed by"
John C. Irvine, Commissioner

"Original Signed by"
Gerald O. Jewers, Commissioner

"Original Signed by"
Alice R. Krueger, Commissioner

"Original Signed by"
Perry W. Schulman, Commissioner

APPENDIX A

TABLE OF CASES

Stein v. Exec-U-Fit Personal Fitness Training Centres Inc. (2007), 157 A.C.W.S. (3d) 520 (Ont. S.C.J.).

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Pascoe v. Ball Hockey Ontario Inc. (2005), 137 A.C.W.S. (3d) 74 (Ont. S.C.J.).

Goodspeed v. Tyax Mountain Lake Resort Ltd., 2005 BCSC 1577, 143 A.C.W.S. (3d) 779.

Sibley v. British Columbia Custom Car Assn. (c.o.b. Mission Raceway Park and/or Mission Race Ways), 2005 BCSC 509, 138 A.C.W.S. (3d) 398.

Pelechytik v. Snow Valley Ski Club, 2005 ABQB 532, 53 Alta. L.R. (4^{th}) 117.

Champion v. Ski Marmot Basin, 2005 ABQB 535, 379 A.R. 173.

Knott v. Doe, 2005 BCSC 240, 137 A.C.W.S. (3d) 302.

Rauhanen v. Lee, 2003 ABQB 84, 120 A.C.W.S. (3d) 539.

Dixon v. British Columbia Snowmobile Federation, 2003 BCCA 174, 120 A.C.W.S. (3d) 1066.

Brown v. Blue Mountain Resort Ltd. (2002), 116 A.C.W.S. (3d) 850 (Ont. S.C.J.).

Braid Estate v. Whistler River Adventures Ltd., 2000 BCSC 1740, 101 A.C.W.S. (3d) 650.

Laws v. Wright, 2000 ABQB 49, 77 Alta. L.R. (3d) 13.

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Ochoa v. Canadian Mountain Holidays Inc., [1996] B.C.J. No. 2026 (B.C.S.C) (QL).

Clarke v. Action Driving School Ltd. (1996), 62 A.C.W.S. (3d) 1240 (B.C.S.C.).

Nairne v. Wagon Wheel Ranch Ltd. (1995), 54 A.C.W.S. (3d) 1386 (Ont. Ct.J. (Gen. Div.)).

Schuster v. Blackcomb Skiing Enterprises Ltd. Partnership (1994), [1995] 3 W.W.R. 443 (B.C.S.C).

Greeven v. Blackcomb Skiing Enterprises Ltd. (1994), 22 C.C.L.T. (2d) 265 (B.C.S.C.).

McQuary v. Big White Ski Resort Ltd. (1993), 42 A.C.W.S. (3d) 940 (B.C.S.C.).

Llewellyn v. MacSwain (1993), 106 Nfld. & P.E.I.R. 101 (P.E.I. S.C. (T.D.)).

Lafontaine (Guardian ad litem of) v. Prince George Auto Racing Association (1994), 45 A.C.W.S. (3d) 419 (B.C.S.C.).

Ocsko v. Cypress Bowl Recreations Ltd. (1992), 74 B.C.L.R. (2d) 159 (B.C.C.A.).

Blomberg v. Blackcomb Skiing Enterprises Ltd. (1992), 64 B.C.L.R. (2d) 51 (B.C.S.C.).

Totman v. Pyramid Riding Stables Ltd. (1992), 132 A.R. 332 (Alta. Q.B.).

Scurfield v. Cariboo Helicopter Skiing Ltd. (1993), 74 B.C.L.R. (2d) 224 (B.C.C.A.).

Knowles v. Whistler Mountain Ski Inc. [1991] B.C.J. No. 61 (B.C.S.C.) (QL).

Cudmore Estate v. Deep Three Enterprises Ltd., [1991] O.J. No 1453 (Ont. Ct. J. (Gen. Div.)) (QL).

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Dyck v. Man Snowmobile Association Inc., [1985] 1 S.C.R. 589.

Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 (B.C.S.C.).

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Miller (Next friend of) v. Sinclair (c.o.b. Sinclair's Riding Stables) (1980), 5 A.C.W.S. (2d) 442 (Ont. H.C.J.).

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Saari v. Sunshine Riding Academy Ltd. (1967), 65 D.L.R. (2d) 92 (Man. Q.B.).

Collins v. Richmond Rodeo Riding Ltd. and Amunason (1966), 56 D.L.R. (2d) 428 (B.C.S.C.).

APPENDIX B

CONSULTATION RESPONDENTS

Providers of Sporting and Recreational Activities

Adventure Skydiving, Vancouver, British Columbia
Asessippi Ski Area and Winter Park, Inglis, Manitoba
Basketball Manitoba, Winnipeg, Manitoba
Canada West Ski Areas Association, British Columbia
Disabled Skiing Association of Manitoba, Winnipeg, Manitoba
Divers Den, Winnipeg, Manitoba
3 Fathoms S.C.U.B.A., Winnipeg, Manitoba
Holiday Mountain Resort, La Riviere, Manitoba
Manitoba Ringette Association, Winnipeg, Manitoba
Mission Ridge Winter Park, Saskatchewan
Northern Soul Wilderness Adventures Inc., Winnipeg, Manitoba
Paintball Paradise, Winnipeg, Manitoba
Professional Association of Dive Instructors, British Columbia
Special Olympics Manitoba, Winnipeg, Manitoba
Splatters Paintball, Winnipeg, Manitoba
Sport Manitoba, Winnipeg, Manitoba
Stony Mountain Ski Area, Stony Mountain, Manitoba
Thompson Ski Club Inc., Thompson, Manitoba
Triethlon Manitoba, Winnipeg, Manitoba
WAV Paddling Kayaking School, Winnipeg, Manitoba

Non-Profit Corporate Charitable Events and Recreational Centres

CancerCare Manitoba Foundation, Winnipeg, Manitoba
City of Winnipeg Community Centres, Winnipeg, Manitoba
MTS Allstream, Winnipeg, Manitoba

Insurance Industry

Gougeon Insurance Brokers, Sudbury, Ontario
Integro Insurance Brokers, Vancouver, British Columbia
Jardine Lloyd Thompson Canada Inc., Calgary, Alberta
Marsh Canada Ltd., Vancouver, British Columbia
Reider Insurance, Winnipeg, Manitoba
Sports Insurance. Com, Adventure Insurance Agency, Vancouver, British Columbia

Lawyers

Mr. Ted Bock, Winnipeg, Manitoba
Mr. Keith Ferbers, Winnipeg, Manitoba
Mr. Michael Finlayson, Winnipeg, Manitoba
Ms. Jamie Jurczak, Winnipeg, Manitoba

WAIVERS OF LIABILITY FOR SPORTING AND RECREATIONAL INJURIES

EXECUTIVE SUMMARY

A. INTRODUCTION

This report deals with the use of written contractual waivers of liability by providers of sporting and recreational activities. Contractual waivers are usually required for consumers to participate in a wide variety of activities. This report recommends that there be limitations on the use of waivers of liability for personal injuries or death resulting from negligence in sporting and recreational activities.

B. AN OVERVIEW OF WAIVERS OF LIABILITY

Civil liability for providers of sporting and recreational activities for the personal injuries or death of consumers may arise under three regimes of legal responsibility: *The Occupiers' Liability Act*, the tort of negligence or the law of contract. Usually, waivers are designed to negate the civil liability of providers of sporting and recreational activities for the personal injuries or death of consumers. This report reviews the potential bases of liability and the principles controlling the validity and scope of waivers of liability.

The Business Practices Act and *The Consumer Protection Act* contain sections that relate to the provision of commercial services including the providers of sporting and recreational activities and generally are aimed at protecting consumers from the consequences of unequal bargaining power and unfair business transactions.

This report reviews Canadian case law on personal injury and fatality claims made against providers of sporting and recreational activities that have been defended in full or in part by the use of a contractual waiver of liability. Providers and consumers are faced with a very uncertain regime of responsibility and the outcome depends upon the technicalities of waiver validity and interpretation and judicial discretion.

Critics of waivers of liability argue that there is much disparity of information, knowledge and understanding of the function of waivers, that waivers negate the accident prevention function of negligence law designed to encourage cost effective steps to protect the safety of persons and that waivers allocate the cost of negligent conduct not solely to the consumer but also to society at large through the provision of health care and disability services. Proponents of waivers of liability assert the freedom to contract, that there are sufficient consumer protection principles in contract law and legislation and that the unburdening of tort losses enables providers to offer sporting and recreational activities at a lower cost.

C. OTHER JURISDICTIONS

The Law Reform Commission of British Columbia is the only Canadian law reform agency to have issued a report respecting the role of waivers in sporting and recreational activities. Although the focus of their report was on alpine skiing, the Commission recommended that providers should be prevented from relying on waivers in respect of certain kinds of risks and certain classes of consumers, such as risks that are exclusively within the control of the operator/provider over which the consumer has no control.

In England, Wales and Northern Ireland the use of waivers in respect of liability for death or personal injury resulting from negligence is controlled by Part 1 of *The Unfair Contract Terms Act 1977*. Recently, there has been increased legislative protection for consumers in *The Unfair Terms in Contacts Regulation 1999*, which applies to some unfair terms in contracts between a seller or a supplier and a consumer and *The Consumer Protection from Unfair Trading Regulation 2008*, which applies to some unfair commercial practices.

D. OPTIONS FOR REFORM

The Commission considered various options for reform of the law relating to waivers of liability for sporting and recreational injuries ranging from greater judicial control of waivers to preventing providers from relying on some or all waivers of liability.

The Commission has recommended that the use of waivers of liability be prohibited and believes that this would enhance consumer protection in Manitoba. The Commission has provided an alternative recommendation that would partially limit the use of waivers of liability and render them ineffective unless they are fair and reasonable in the circumstances. The Commission makes several recommendations for the circumstances to be considered when determining the fairness and reasonableness of waivers of liability, including the representations made to the consumer at the time a waiver of liability is obtained, the steps taken to bring a waiver of liability to the attention of the consumer, the hazard causing the personal injury or death and the relationship between the activity provider and the consumer.

The Commission believes that providers of sporting and recreational activities should be able to obtain an acknowledgment and assumption of inherent risk from consumers. The Commission suggests that this can be accomplished without obtaining a waiver of liability for personal injury or death resulting from negligence.

The Commission makes recommendations regarding the enactment of new legislation and suggests that in conjunction with the implementation of new legislation, public awareness initiatives be conducted respecting the rights and remedies of consumers.

LES EXONÉRATIONS DE RESPONSABILITÉ CONCERNANT LES BLESSURES LIÉES À DES ACTIVITÉS SPORTIVES ET RÉCRÉATIVES
SOMMAIRE

A. INTRODUCTION

Le présent rapport traite du recours, par les fournisseurs d'activités sportives et récréatives, à des exonérations écrites de la responsabilité contractuelle. Les consommateurs sont fréquemment tenus de signer des exonérations contractuelles, et ce, pour pouvoir participer à une vaste gamme d'activités. Dans le présent rapport, il est recommandé de restreindre l'utilisation d'exonérations de responsabilité lorsqu'il s'agit de blessures ou de décès causés par la négligence dans le cadre d'activités sportives et récréatives.

B. VUE D'ENSEMBLE SUR LES EXONÉRATIONS DE RESPONSABILITÉ

Les fournisseurs d'activités sportives et récréatives, pour ce qui touche aux blessures ou décès de consommateurs, peuvent engager leur responsabilité sous trois régimes légaux : la *Loi sur la responsabilité des occupants*, le délit de négligence ou le droit des contrats. Généralement, les exonérations sont conçues de manière à ce que les fournisseurs d'activités sportives et récréatives ne soient pas responsables des blessures ou décès subis par des consommateurs. Le présent rapport examine les possibles fondements de la responsabilité et les principes régissant la validité et la portée des exonérations de responsabilité.

La *Loi sur les pratiques commerciales* et la *Loi sur la protection du consommateur* comportent des articles sur la prestation de services commerciaux, y compris les fournisseurs d'activités sportives et récréatives; elles visent de façon générale à protéger les consommateurs des conséquences de l'inégalité du pouvoir de négociation et des opérations commerciales déloyales.

Le présent rapport examine la jurisprudence canadienne qui concerne les réclamations pour blessures et décès, faites à l'encontre de fournisseurs d'activités sportives et récréatives et qui ont donné lieu à une contestation, en tout ou en partie, par voie d'exonération de responsabilité contractuelle. Les fournisseurs et les consommateurs sont confrontés à un régime de responsabilité très incertain, et l'issue dépend des modalités techniques liées à la validité et à l'interprétation de l'exonération, ainsi que du pouvoir judiciaire discrétionnaire.

Selon les détracteurs du recours aux exonérations de responsabilité, il existe une grande disparité dans l'information, la connaissance et la compréhension pour ce qui concerne la fonction des exonérations; de plus, selon eux, les exonérations vont à l'encontre de la fonction de prévention des accidents dans le droit en matière de négligence, qui vise à favoriser des mesures efficaces pour protéger la sécurité des personnes, et elles aboutissent à faire supporter le coût de la conduite négligente, non seulement au consommateur, mais aussi à la société en général, par le biais de la prestation de soins de santé et de services aux personnes ayant des déficiences. Les partisans des exonérations de responsabilité invoquent la liberté contractuelle, le fait qu'il existe suffisamment de

principes établis en matière de protection des consommateurs dans le droit et la législation des contrats et soutiennent que l'allègement des pertes découlant de la responsabilité civile délictuelle pour les fournisseurs leur permet d'offrir des activités sportives et récréatives à un moindre coût.

C. AUTRES AUTORITÉS LÉGISLATIVES

La Law Reform Commission de British Columbia est la seule commission de réforme du droit canadienne à avoir publié un rapport examinant le rôle des exonérations dans les activités sportives et récréatives. Bien que le rapport ait été axé sur le ski alpin, la Commission a recommandé qu'il soit interdit aux fournisseurs de recourir à des exonérations pour certains types de risques et catégories de consommateurs, comme les risques qui relèvent exclusivement du contrôle de l'exploitant ou du fournisseur et sur lesquels le consommateur n'a aucun contrôle.

En Angleterre, au Pays de Galles et en Irlande du Nord, le recours à des exonérations relatives à la responsabilité pour des décès ou des blessures découlant de la négligence est régi par la partie I de la *Unfair Contract Terms Act 1977*. Récemment, la protection législative des consommateurs a été renforcée à l'aide de l'*Unfair Terms in Consumer Contracts Regulation 1999*, qui s'applique à certaines clauses déloyales prévues dans des contrats conclus entre un vendeur ou un fournisseur et un consommateur, et du *Consumer Protection from Unfair Trading Regulation 2008*, qui s'applique à certaines pratiques commerciales déloyales.

D. OPTIONS DE RÉFORME

La Commission a examiné différentes options de réforme du droit en ce qui touche aux exonérations de responsabilité pour des blessures liées à des activités sportives et récréatives; elles vont d'un plus grand contrôle judiciaire des exonérations à l'interdiction pour les fournisseurs d'invoquer certaines exonérations de responsabilité, voire toutes.

Elle a recommandé d'interdire le recours aux exonérations de responsabilité et estime que cette mesure aurait pour effet d'accroître la protection des consommateurs au Manitoba. La Commission a prévu une recommandation de rechange qui limiterait, en partie, le recours aux exonérations de responsabilité et les rendrait sans effet à moins qu'elles ne soient justes et raisonnables, dans les circonstances. La Commission a formulé plusieurs recommandations sur les circonstances à prendre en considération au moment d'établir le caractère juste et raisonnable des exonérations de responsabilité, notamment les affirmations faites au consommateur avec la demande d'exonération de responsabilité, les mesures prises pour porter l'exonération de responsabilité à l'attention du consommateur, le danger causant les blessures ou le décès et le lien entre le fournisseur de services pour les activités et le consommateur.

La Commission estime que les fournisseurs d'activités sportives et récréatives devraient toujours pouvoir obtenir une reconnaissance et une acceptation du risque inhérent de la part des consommateurs. Elle soutient qu'ils peuvent le faire sans obtenir une exonération de responsabilité pour les blessures ou décès causés par la négligence.

La Commission formule des recommandations sur l'adoption de nouvelles dispositions législatives et propose qu'il y ait, conjointement à la mise en œuvre de nouvelles dispositions législative, des initiatives de sensibilisation du public en ce qui concerne les droits et les recours des consommateurs.